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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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V.99-81174

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 226: CISG [4(a)]
Germany: Oberlandesgericht Koblenz; 5 U 534/91
16 January 1992
Original in German
Published in German in [1992] Recht der internationalen Wirtschaft 1019; [1994] Praxis des internationalen Privat- und Verfahrensrechts 46; and Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 (No. 72)
Abstract in Italian in [1994] Diritto del Commercio Internazionale (No. 34), 852
Commented on in German by Schurig in [1994] Praxis des internationalen Privat- und Verfahrensrechts 46

A Dutch seller, plaintiff, sold a yacht to a German company. Under the contract, the seller retained title to the yacht ("retention of title"). The yacht was subsequently transferred to the defendant, a silent partner of the German company. When the German company was declared bankrupt, the parties disputed the validity of the "retention of title" clause.

The court held that the CISG did not apply to the validity of a "retention of title" clause.

Case 227: CISG 8(2); 18(1); 19(1); 52; 61(1)(b); 64(1)(a); 74; 75; 76; 77; 78
Germany: Oberlandesgericht Hamm; 19U 97/91
22 September 1992
Original in German
Published in French by Claude Witz, [1995] Les premières applications jurisprudentielles du droit uniforme de la vente internationale-Convention des Nations Unies du 11 avril 1980, Librarie Générale de Droit et de Jurisprudence (L.G.D.J.), Collection Droit des affaires (Paris) 142
Abstract in German in [1993] Oberlandesgerichtsrechtsprechungs-Report Hamm 27

A German buyer, defendant, offered to purchase ten lots of "wrapped" bacon from an Italian seller, plaintiff. The seller's reply to the buyer's offer referred instead to "unwrapped" bacon. However, in its reply to the seller, the buyer did not object to the change in terms. After four lots had been delivered, the buyer refused to accept further deliveries. Therefore, the seller declared the contract avoided and sold the remaining six lots at a price much lower than both the market- and the agreed purchase- price. The seller claimed damages, the outstanding purchase price and interest.

The court held that the seller's reply to the buyer's offer was a counter-offer (article 19(1)CISG) and not an acceptance (article 18(1) CISG), and that the buyer's reply to the counter-offer, inasmuch as it did not contain any objections to the change in terms, should be considered an unconditional acceptance (article 8(2) CISG). Consequently, the seller was entitled to declare

the contract avoided because the buyer's failure to take delivery of more than half of the goods constituted a fundamental breach of contract (article 64(1)(a) CISG).

The court also held that the seller was entitled to claim damages (articles 61(1)(b) and 74 CISG). To assess damages, priority had to be given to the method of calculation under article 75 CISG. In mitigating its loss, however, the seller was obliged to undertake a profitable resale of the goods (article 77 CISG). As the seller had been unable to resell the goods for more than the market price, i.e. the market price at the place of delivery rather than that at the seller's place of business, the method of calculation under article 76 CISG was applied. Lastly, the court granted the outstanding purchase price (article 52 CISG) and interest (article 78 CISG).

Case 228: CISG 1(1)(a); 1(1)(b); 53; 58(1); 78; 92(2)
Germany: Oberlandesgericht Rostock; 1 U 247/94
27 July 1995
Original in German
Published in German in [1996] Oberlandesgerichtsrechtsprechung Rostock 50

A Danish seller, plaintiff, delivered bedding plants to German buyers, defendants. When the buyers did not pay the invoices, the seller engaged the services of a debt collection agency. However, the debt collection agency was unable to recover from the buyers the sum concerned. The seller's claim for the purchase price and interest as well as for the expenses incurred by the debt collection agency was granted by the lower court. The buyers appealed the decision.

The appellate court held that the buyers were bound to pay the purchase price (article 53 CISG), the CISG being applicable under its article 1(1)(a), since Denmark and Germany were both Contracting States, and also under article 1(1)(b) CISG. But, Denmark had made a reservation under article 92(2) CISG such that it was not bound by Part II (Formation) of the CISG. Therefore, under the German rules of private international law, the formation of the parties' contract was governed by Danish law, according to which a binding contract existed between the parties.

Furthermore, the appellate court also held that interest on the purchase price was owed (article 78 CISG). The only condition on the obligation to pay interest was that the purchase price under the contract must be due and payable (article 58(1) CISG). And, as the CISG does not regulate the rate of interest, this rate was determined according to national law selected under the rules of private international law, which resulted in the application of Danish law.

Lastly, the appellate court overturned the lower court's decision regarding the expenses incurred by the debt collection agency inasmuch as such expenses do not fall within the ambit of the CISG.

Case 229: CISG 6; 38(1); 39(1); 49
Germany: Bundesgerichtshof; VIII ZR 306/95
4 December 1996
Original in German
Published in German in [1997] Neue Juristische Wochenschrift-Rechtsprechungsreport 690
Abstract in German in [1997] Entscheidungen zum Wirtschaftsrecht 653 and in [1997] Wirtschaftsrechtliche Beratung 602
Commented on in German by Schlechtriem/Schmidt-Kessel in [1997] Entscheidungen zum Wirtschaftsrecht 653

A German seller sold to an Austrian buyer a computer printing system that comprised a printer, monitor, calculator and software. The seller delivered the printing system to the buyer. Then, the buyer gave to the seller written notice of eight deficiencies, including the absence of "documentation concerning the printer", and provided an additional period of time for the seller to rectify these deficiencies. The seller sent to the buyer the printer documentation (i.e. as a single apparatus). Nonetheless, the buyer declared the contract avoided, referring to the deficiencies previously notified, but without mentioning the receipt of the documentation on the printer as a single apparatus. The seller assigned its rights under the contract. The assignee, plaintiff, sued the buyer, defendant, for payment of the purchase price. On appeal, the trial court's decision in favour of the plaintiff was reversed. The plaintiff appealed further.

Under the contract, the warranty between the seller and buyer had priority over the provisions of the CISG (article 6 CISG). However, because the warranty did not address either the period for examination of the goods, the specifications as to the deficiencies that were to be given in the notice or the reasonable time to give such notice, these matters remained governed by articles 38(1) and 39(1) CISG.

The court held that although notice by the buyer was given in time, it did not clearly specify whether the missing documentation was in respect of the entire printing system or merely the printer as a single apparatus. The seller, however, had understood the missing documentation as relating solely to the printer as a single apparatus. In order to fulfill the requirements of article 39(1), the buyer had to have described the lack of conformity with sufficient specificity so as to avoid any misunderstanding (article 39(1) CISG).

The court also held that, based solely on the claim of missing documentation, the buyer's avoidance of the contract was not effective (article 49 CISG). The court, therefore, remanded the case back to the first appellate court.

Case 230: CISG 1(1)(a); 1(1)(b); 7(1); 38(1); 39(1); 40; 44; 80
Germany: Oberlandesgericht Karlsruhe; 1 U 280/96
25 June 1997
Original in German
Published in German in [1998] Der Betriebsberater 393 and [1998] Recht der Internationalen Wirtschaft 235
Abstract in German in [1997] Entscheidungen zum Wirtschaftsrecht 785
Commented on in German by Schlechtriem in [1997] Entscheidungen zum Wirtschaftsrecht 785

A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller.

The CISG was applicable under both articles 1(1)(a) and 1(1)(b) CISG.

The court dismissed the buyer's claim, noting that, for durable goods, a reasonable period for examination would be 3 or 4 days (article 38(1) CISG), the extent and intensity of examination being dependent upon the type of goods, packaging and testing possibilities. Although there had been long-standing business relations between the parties, spot-checks and test treatments were required where the lack of conformity would have become evident only upon use. As subsequent testing indicated, had the buyer begun tests within 3 or 4 days after delivery, the defect would have been discovered within 7 days. For durable goods, notice should be given to the seller within 8 days after the lack of conformity ought to have been discovered. Therefore, as notice was given after the expiry of a reasonable notice period, the buyer lost its right to rely on the lack of conformity (article 39(1) CISG). Moreover, although under article 44 CISG the buyer could raise a reasonable excuse for failure to give the required notice in accordance with article 39(1) CISG, the former article did not apply to a failure to examine in keeping with article 38(1) CISG.

Further, the court held that it was insufficient that the seller had knowledge of the glue glazing. The buyer had to prove that the seller knew this would constitute a lack of conformity (article 40 CISG). By negotiating over the lack of conformity, the seller did not forfeit its right to plead that notice was given out of time. Taking into consideration the principle of good faith, such forfeiture could only be recognised if special circumstances so indicate (articles 7(1) and 80 CISG).

Case 231: CISG 6
Germany: Bundesgerichtshof; VIII ZR 130/96
23 July 1997
Original in German
Published in German in [1997] Der Betriebsberater 1860, in [1997] Zeitschrift für Insolvenzpraxis 1933 and in [1997] Neue Juristische Wochenschrift 3304
Commented on in German by Eckhard Wolf, "Die Rechtsprechung des Bundesgerichtshofs zum Kaufrecht" in [1998] Wertpapier Mitteilungen (Part 4): [1998] 47 Zeitschrift für Wirtschafts- und Bankrecht 41 (special issue no. 2)

An Italian seller, plaintiff, agreed to deliver fashion textiles to a German buyer, defendant.

As the parties had chosen the application of German law to the exclusion of the CISG under Article 6 CISG, the court did not consider the CISG applicable.

Case 232: CISG 1(1)(a); 4(a); 18; 38(1); 39(1); 40; 49; 50; 53
Germany: Oberlandesgericht München; 7 U 4427/97
11 March 1998
Original in German
Abstract in German in [1998] Entscheidungen zum Wirtschaftsrecht 549
Commented on in German by Schlechtriem in [1998] Entscheidungen zum Wirtschaftsrecht 549

A German buyer, defendant, ordered cashmere sweaters from an Italian seller, plaintiff. The seller sued the buyer for the outstanding purchase price. The buyer sought set-off, claiming that it had notified the seller that the sweaters were defective.

The court held that the CISG was applicable and that the seller was entitled to the purchase price under the CISG (articles 1(1)(a) and 53 CISG). The buyer's set-off claim was not granted as set-off claims are prohibited under the Standard Conditions of the German Textile and Clothing Industry, which the parties had made applicable to their contract (article 18 CISG). The set-off issue was to be determined in accordance with German law (article 4(a) CISG).

In addition, the court held that the buyer could not declare the contract avoided (article 49 CISG) or reduce the purchase price (article 50 CISG). The buyer had lost the right to rely on the alleged lack of conformity of the goods as it should have examined the goods within as short a period as the circumstances required (articles 38(1) and 39(1) CISG). The parties had agreed to set this period for examination at two weeks by incorporation of the Standard Conditions and the buyer failed to comply with that agreement.

Moreover, the court stated that application of article 39(1) CISG could not be excluded by operation of article 40 of the CISG, which would have been applicable only if the seller had overlooked obvious defects in the goods that could have been detected through the exercise of

ordinary care. In this case, since the buyer had distributed the goods to its own customers, the goods were clearly neither unusable nor unsaleable.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 233: MAL 35(1); 36(1)(b)(ii)
Zimbabwe: Harare High Court (Judge Chatikobo); Judgment No. HH-133-97
10 July and 20 August 1997
Durco (Pvt) Ltd v. Dajen (Pvt) Ltd
Original in English
Published in English in 1997(2) Zimbabwe Law Reports 199 (Harare)

Two parties, a grain producer and a miller, had submitted their dispute to a single arbitrator which resulted in an award in favour of the miller. As a third party was involved who had not been a party to the arbitration, it was feared that further proceedings might ensue. Accordingly, it was felt to be in the interests of all concerned to submit to a second arbitration which would be binding on all three parties.

The second arbitration, before a panel of three arbitrators, however, resulted in an award against the miller. The miller refused to comply with the second award and the grain producer applied to the High Court for its recognition and enforcement under article 35 MAL. The miller opposed the award on the grounds that it would be contrary to public policy to enforce the award in terms of article 36(1)(b)(ii) MAL, contending that since there was already an award it would offend the principle of finality in arbitration to enforce the second award.

The court held that, by agreeing to submit to a second arbitration, the miller had waived its rights to finality of the first award. Accordingly, the miller was now bound by the second award and the court ordered that it should be recognised and enforced. The miller appealed (see CLOUT case no. 234) to the Supreme Court.

Case 234: MAL 35(1); 36(1)(b)(ii)
Zimbabwe: Supreme Court of Zimbabwe (Judges of Appeal: Muchechetere, Ebrahim and Sandura); Judgment No. SC 141/98
22 June and 7 September 1998
Dajen (Pvt) Ltd v. Durco (Pvt) Ltd
Original in English
Unpublished

The miller, the unsuccessful party in CLOUT case no. 233, appealed to the Supreme Court. In dismissing the appeal, the Supreme Court held that the principle of finality did not

destroy or supplant a party's power to waive any right derived from an award and that this is what the miller had done by submitting to the second arbitration.

III. ADDITIONAL INFORMATION

Document A/CN.9/SER.C/ABSTRACTS/18

Addendum

(Arabic, Chinese, English, French, Spanish and Russian texts)

Case 222

Published in English in: 37 International Legal Materials 1141 (1998)

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V.99-81857

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 235: CISG 38; 39(1); 45(1)(b); 49(1)(a); 51(1); 74; 81(1); 82(1); 82(2)(b)
Germany: Bundesgerichtshof; VIII ZR 300/96
25 June 1997
Original in German
Published in German [1997] Neue Juristische Wochenschrift 3311; [1997] Der Betrieb 2073; [1998] Lindenmaier-Möhring 2 (No. 4); [1997] Wertpapiermitteilungen 2313; [1997] Monatsschrift für Deutsches Recht 1105; [1997] Recht der internationalen Wirtschaft 1037; and [1998] Europäische Zeitschrift für Wirtschaftsrecht 29
Abstract published in German in [1997] Eildienst Bundesgerichtliche Entscheidungen (BGH-Ls) 529; [1997] Entscheidungen zum Wirtschaftsrecht 3311; [1998] Schweizerische Zeitschrift für Internationales und Europäisches Recht 85 and [1997] Wirtschaftsrechtliche Beratung 1315
Commented on in German by Magnus in [1998] Lindenmaier-Möhring 2 (No. 4); Schlechtriem/Schmidt-Kessel in [1997] Entscheidungen zum Wirtschaftsrecht 3311; Gaus in [1997] Wirtschaftsrechtliche Beratung 1315; and in French by Witz [1998] Receuil Dalloz, 34ème Cahier, Sommaire commentés, 309

A German seller, plaintiff, delivered stainless steel wire to a Swiss buyer, defendant. The buyer gave notice to the seller that it was unable to work with the sub-standard goods delivered and placed them at the seller's disposal. The seller declared its intention to credit the value of the goods if the buyer's contention of lack of conformity was justified.

The seller sued the buyer for the unpaid purchase price. The buyer claimed set-off for expenses incurred with the refacing of a grinding machine, which was utilized for processing the defective goods.

The Court dismissed the seller's claim. The buyer was entitled to declare the contract avoided under articles 81(1), 49(1)(a) and 51(1) CISG. In fact, the buyer had effectively avoided the contract by communicating to the seller that it could not use sub-standard goods. The court left open whether the buyer examined the goods (article 38 CISG) and gave notice (article 39 CISG) within a reasonable period of time since the seller had waived its right to object by agreeing to credit the value of the non-conforming goods.

The impossibility of restoring the goods to their original condition did not disqualify the buyer from avoiding the contract under article 82(1) CISG. Both parties were aware that the goods had to be processed before any non-conformity could be discovered. Moreover, the buyer was entitled to declare the contract avoided if upon examination it was discovered that the goods had perished or deteriorated (article 82(2)(b) CISG).

The court also dismissed the set-off since the expenses for the refacing of the grinding machine were not reasonable in relation to the amount of the claim for the purchase price and had to be borne by the buyer under article 74 CISG. The court stated that considering the amount of

the expenses in question, the buyer should have returned the goods and claimed damages under articles 45(1)(b) and 74 CISG.

Case 236: CISG 1(1)(b); 4(2)(a); 45(1)(b); 53; 54
Germany: Bundesgerichtshof; VIII ZR 134/96
23 July 1997
Original in German
Published in German in [1997] Neue Juristische Wochenschrift 3309
Abstract published in German in [1997] Schweizerische Zeitschrift für Internationales und Europäisches Recht 86 and [1997] Entscheidungen zum Wirtschaftsrecht 958
Commented on in German by Schlechtriem/Schmidt-Kessel [1997] Entscheidungen zum Wirtschaftsrecht 958

An Italian seller, plaintiff, claimed payment for clothes delivered to a German buyer, defendant, under a supply contract.

The buyer refused payment of the purchase price for the goods, alleging that the parties had a void franchise agreement since it violated European and German antitrust laws. The buyer also adduced that the nullity of the franchise agreement affected the validity of their supply contract.

The court held that the CISG was applicable under its article 1(1)(b) since the parties had agreed to the application of German law. The seller's claim was justified under articles 53 and 54 CISG. It was insignificant whether the franchise agreement violated German or European antitrust laws inasmuch as the nullity of the franchise agreement did not affect the validity of the supply contract. However, each supply contract had to be examined separately and the validity of the supply contract was not governed by the CISG in keeping with its article 4(2)(a). The court also held that the buyer was obliged to pay the seller the purchase price and that the buyer was not entitled to claim damages under article 45(1)(b) CISG.

Case 237: CISG 7(2); 35(2); 38; 39; 40
Arbitration Institute of the Stockholm Chamber of Commerce
(Arbitral award issued on the basis of liability; separate award to be issued on amount of damages)
5 June 1998
Unpublished (English)

(Abstract prepared by Peter Winship)

A manufacturer in the United States contracted with a joint venture in the People's Republic of China to sell a press. The contract guaranteed that the press was made of "the best materials with first class workmanship, brand new and unused." During manufacture, the seller substituted a different lockplate for the lockplate described in the design documents given to the buyer. The seller did not inform the buyer of this substitution or of the need to install the lockplate properly. The seller shipped the disassembled press from the United States to China and when the buyer reassembled the press in China the lockplate was installed improperly. Slightly more than four years after the seller shipped the press, the lockplate broke, causing significant damage to the press. The buyer immediately notified the seller. When the seller rejected any liability for the breakdown, the buyer requested arbitration.

The issues before the arbitral tribunal were whether the U.S. seller made a non-conforming tender of goods and whether the Chinese buyer's claim of non-conforming goods was timely.

The arbitral tribunal found the seller liable for damages for the failure of the press. The tribunal concluded that the tender of the press did not conform under article 35(2) CISG. The seller was aware of the possibility that the substitute lockplate would probably fail if it was not properly installed. The seller, nonetheless, failed to inform the buyer of the need to install the lockplate properly. The mere inclusion of an express guarantee in the contract did not exclude the obligations set out in article 35(2) CISG. The tribunal further found that the buyer was not negligent when it installed the lockplate or later maintained the press.

A majority of the tribunal also found that the buyer's claim was timely because under article 40 CISG the seller was not entitled to rely on the time limits set forth in article 39 CISG. The tribunal stated that it did not matter whether the non-conformity resulted from breach of the contract guarantee or breach of article 35 CISG. Even if articles 38 and 39 CISG were concerned only with examination and notice of non-conformity under CISG, article 40 CISG states a general principle that applies to contractual obligations by virtue of article 7(2) CISG. The majority of the tribunal concluded that article 40 CISG excused notice by the buyer because the seller "consciously disregarded facts which were of evident relevance to the nonconformity".

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V.99-82565

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 238: CISG 1(1)(b); 71(1)(a); 73(2)
Austria: Supreme Court; 2 Ob 328/97t
12 February 1998
Original in German
Published in German [1998] Zeitschrift für Rechtsvergleichung 158

An Austrian buyer, defendant, ordered umbrellas from a Czech seller, plaintiff. The parties agreed to a reduction of the purchase price inasmuch as the goods were defective. However, the buyer did not pay for two subsequent deliveries. Upon the seller's request for payment, the buyer showed the seller a copy of a bank payment order. Then, the buyer cancelled the bank payment order without informing the seller. Lacking liquidity, the seller could neither produce nor deliver goods ordered. The seller, therefore, suspended performance of the contract and sued the buyer. The buyer notified the seller of its compensation claim arising from non-compliance with the contract.

The Supreme Court held that although the contract between the two parties had been concluded before the CISG had entered into force in the Czech Republic, the contract was governed by the CISG under its article 1(1)(b) since the parties had agreed to the application of Austrian law.

The Supreme Court further held that a seller who acts in conformity with a contract may choose between the remedies available under CISG articles 71(1)(a) and 73(2). Neither the fact that the buyer had not paid the purchase price for a number of deliveries nor the cancellation of the bank payment order indicated with a sufficient degree of probability a serious deficiency in the buyer's ability to perform the contract or in its creditworthiness in keeping with CISG article 71(1)(a). The seller's right, therefore, to suspend performance had not been established.

Accordingly, the Supreme Court overturned the decision of the appellate court and remanded the case to the court of first instance for consideration of other issues.

Case 239: CISG 1(1)(a); 14(1); 18(1)
Austria: Supreme Court; 3 Ob 512/96
18 June 1997
Original in German
Published in German in [1998] Juristische Blätter 255

An Austrian buyer, defendant, ordered shoes from a German company after the presentation of a model of a pair of shoes by Mr. J, an employee of the German company. The buyer's order was sent to the German company, which transmitted it to an Italian seller, plaintiff.

Referring to the buyer's order, employees of the seller requested and received the approval of the buyer for the colour of the shoes. After delivery of the shoes, the seller sent the invoice to the buyer, who, at the request of Mr. J, transmitted a cheque to the German company in order to pay the seller. However, the seller never received payment either from the buyer or Mr. J. The seller, therefore, sued the buyer for the purchase price of the shoes and interest.

The Supreme Court, in holding that the CISG was applicable to the case under its article 1(1)(a), found that it was not clear whether the buyer had concluded the contract with the German company or

with the seller. Consequently, it had to be determined whether Mr. J was an independent mercantile agent who could accept an order from the buyer on the seller's behalf or whether Mr. J had merely transmitted the order (contract) to the seller. No contract could be deemed to have been concluded if Mr. J was not an independent mercantile agent or if the buyer was not aware that the order was sent to the seller. In addition, from the communications between the employees of the seller and of the buyer alone, no order from the buyer to the seller and therefore no contract between them could be construed inasmuch as the buyer's employees could not assume the seller's behaviour to be an acceptance (articles 14(1) and 18(1) CISG). Accordingly, the Supreme Court remanded the case to the court of first instance for a determination of the independent mercantile agent issue.

Case 240: CISG 1(1)(a); 9(2)
Austria: Supreme Court; 2 Ob 191/98x
15 October 1998
Original in German
Unpublished

The plaintiff was involved in the wood trade and had his place of business in Austria. The Austrian defendant had his place of business in Italy and was also involved in the wood trade.

The plaintiff's son signed a contract with the defendant for the purpose of taking part in the defendant's enterprise. The plaintiff delivered wood for several years to the defendant. The defendant paid the plaintiff a certain amount for the wood delivered, albeit without referring to a specific delivery or invoice. The plaintiff claimed payment of the outstanding invoices as well as interest.

The Supreme Court remanded the case to the court of first instance, holding that the place of business of the parties in different Contracting States and not the citizenship of the parties was relevant for a determination as to whether the CISG applied to the case. Accordingly, the Supreme Court decided that the CISG was applicable to the case under its article 1(1)(a). Moreover, owing to differences in the time limits for notice of lack of conformity between Austrian usages in the trade in wood and the CISG, the Supreme Court held that the court of first instance should examine whether the conditions set forth in article 9(2) CISG as regards usages had been met, in particular whether they were widely known and regularly observed in the trade.

II. ADDITIONAL INFORMATION

Document A/CN.9/SER.C/ABSTRACTS/21

Corrigendum

(ENGLISH TEXT ONLY)

Case 236

Caption and third paragraph: the reference to CISG article "4(2)(a)" *should read* "4(a)".

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UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

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INTRODUCTION

The compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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V.99-85925 (E)

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 241: CISG 1; 4

France: Court of Cassation (First Civil Division); P 96-19.992

5 January 1999

Thermo King v. Cigna, Dentressangle et al.

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/050199.htm

Commented on in French: Leveneur, [1999] Semaine Juridique, Ed. E, 962; [1999] Contrats-Concurrence-Consommation 53.

The First Civil Division of the Court of Cassation set aside the ruling pronounced by the Court of Appeal of Grenoble, as reported in CLOUT Case 204. The Court of Appeal of Grenoble had applied the CISG in the action brought by the French sub-purchaser against the initial seller, an American company, since the latter had issued a contractual guarantee in favour of the end-user.

The Court of Cassation referred to articles 1 and 4 of the Vienna Convention and noted that, in accordance with those provisions, the Convention applied to international contracts for the sale of goods and governed only the rights and obligations of the seller and the buyer arising out of any such contract. By not having established the existence, between the sub-purchaser and the initial seller, of a contract of sale governed by the Convention, the Court of Appeal had failed to observe the above-mentioned provisions.

Case 242: CISG 18; 19; 31

France: Court of Cassation (First Civil Division); J 96-11.984

16 July 1998

S.A. Les Verreries de Saint-Gobain v. Martinswerk GmbH

Original in French

Published in French: [1999] Recueil Dalloz, 8ème Cahier, Jurisprudence, 117; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/16071998.htm

Commented on in French: Witz, [1999] Recueil Dalloz, 8ème Cahier, Jurisprudence, 117; Ancel et Muir Watt, [1999] Revue critique de droit international privé, 122.

The buyer, a French company, placed successive orders with the seller, a German company, for products to be used in glass manufacturing, which were to be transported from the seller's premises to the buyer's premises by tanker lorry chartered by the buyer. The latter claimed that the goods were defective and sued the seller before the Commercial Court of Orleans.

The Court of Appeal of Orleans held that the lower French court had no jurisdiction, basing its ruling on the provisions of the Brussels Convention of 27 September 1968 (articles 17 and 5 (1)) and on those of the CISG. The Court of Appeal considered that the jurisdiction clause appearing on the buyer's order forms in favour of the

Commercial Court of Orleans should not apply since the order confirmations sent by the seller contained a jurisdiction clause in favour of the courts at that company's principal place of business.

The Court of Cassation did not make any reference to the Brussels Convention (article 17). It cited only articles 18 and 19 CISG and stated that a reply to an offer which purported to be an acceptance but which contained different terms that materially altered the terms of the offer, such as a different stipulation regarding the settlement of disputes, as provided for in article 19 (3), did not amount to acceptance. The jurisdiction clause invoked by the buyer was therefore inapplicable. The Court of Cassation also concurred with the Court of Appeal's ruling in regard to the application of article 5 (1) of the Brussels Convention, namely that the obligation to deliver the sold goods, as defined in article 31 CISG, had been performed by the handing over of the goods to the first carrier and that the obligation forming the basis of the claim had thus been performed in Germany.

Case 243: CISG 25; 64 (1) (a); 74

France: Court of Appeal of Grenoble; RG 98/02700

4 February 1999

SARL Ego Fruits v. La Verja

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/040299.htm

The buyer, a French company, ordered 860,000 litres of pure orange juice from the seller, a Spanish company. The contract stipulated that the deliveries were to be staggered from May to December 1996. In return for a price reduction, the parties agreed that the September delivery would take place in late August. At the time of that delivery, the buyer refused the goods. However, in September, the buyer requested that the goods be delivered. Faced with the seller's refusal to deliver, the buyer obtained supplies elsewhere at a higher price and refused to pay for the previous deliveries.

The commercial Court of Romans, before which the case was brought by the Spanish seller, ordered the French company to pay the price of the goods on the ground that the seller was entitled to defer the performance of its obligations on account of the delay on the buyer's part in taking delivery.

The Court of Appeal set aside the ruling. It determined whether the seller was entitled to declare the contract avoided under article 64 (1) (a) CISG. The judges held that the buyer had not committed a fundamental breach, as defined in article 25 CISG, by refusing to take delivery of the goods in late August. The buyer was entitled to regard the bringing forward of the delivery date to late August merely as a reciprocal concession for a financial advantage and could not be expected to have understood that a few days' delay in taking delivery would constitute a fundamental breach on its part. In the absence of any fundamental breach, the seller should have granted the buyer an additional period of time in which to take delivery. The seller's unilateral avoidance thus had to be construed, in the judges' opinion, as wrongful termination of the contract. The judges applied article 74 CISG to calculate the damages awarded to the buyer.

Case 244: CISG 31; 35

France: Court of Appeal of Paris; 97/24418

4 March 1998

Société Laborall v. SA Matis

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz.040398.htm

Commented on in French: Audit, [1998] Recueil Dalloz, 30ème Cahier, Sommaires Commentés, 279

The buyer, a French manufacturer and distributor of beauty-care equipment and cosmetic products, ordered a machine for manufacturing creams from the seller, an Italian company. A document sent by the seller to the buyer stipulated that delivery would take place ex works, i.e. at the seller's premises. That document did not give rise to any specific observations on the part of the buyer. Since the machine was defective, the seller offered to replace it by a machine of a different type subject to certain financial adjustments. Since this new machine presented identical problems, the buyer sued the seller before the Commercial Court of Paris, seeking an order that the lack of conformity of the equipment be remedied, subject to a penalty for non-compliance, and that damages be awarded.

The seller raised a plea of lack of jurisdiction, claiming that the High Court of Milan was competent. This plea was rejected by the Commercial Court of Paris, which invoked article 5 (1) of the Brussels Convention. In the Court's view, the obligation at issue was a conformity obligation devolving upon the seller, in accordance with article 36 (2) CISG. The Italian company raised an objection, invoking article 35 CISG and maintaining that the obligation regarding conformity was an obligation that was linked to the obligation to deliver the goods, which, in accordance with the agreement between the parties, was to be performed at the seller's place of business.

The Court of Appeal of Paris set aside the ruling. The obligation regarding conformity could not be deemed to be independent of the obligation to deliver, as defined in article 35 CISG, and therefore both types of obligation had to be performed at the same place, which, in the present case, was in Italy.

Case 245: CISG 31 (1) (a); 35

France: Court of Appeal of Paris; 97/25212

18 March 1998

Société Franco-Africaine de distribution textile v. More and More Textilfabrik GmbH

Original in French

Published in French: CISG-France http://www. jura.uni-sb.de/FB/LS/Witz/180398.htm

Commented on in French: Audit, [1998] Recueil Dalloz, 30ème Cahier, 279

The buyer, a French company, ordered a supply of first-grade and second-grade winter clothing from the seller, a German company.

On observing that the delivery included summer garments and accessories that had not been ordered and also certain damaged goods, the buyer sued the seller before the Commercial Court of Montereau, basing its case on articles 31, 50 and 51 CISG and seeking damages to compensate for the commercial and financial loss that it had sustained. The Court declined jurisdiction in favour of the Courts of Munich.

The plaintiff raised an objection, invoking article 5 (1) of the Brussels Convention and maintaining that the due place of delivery of the goods was in France. The defendant referred to article 35 CISG, in accordance with which the obligations regarding delivery and conformity of the goods had to be performed in the same place. In accordance with the intention of the parties, which had made their contract subject to the Incoterm "ex works"

(EXW) and with the provisions of article 31 CISG, that place should be the defendant's principal place of business in Germany.

The Court of Appeal rejected the objection. In order to implement article 5 (1) of the Brussels Convention, it applied the Vienna Convention, noting that the obligation regarding conformity could not be deemed to be independent of the obligation to delivery under article 31 (a) CISG, the conformity obligation at issue had to be performed in Germany.

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V.99-89180 (E)

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 246: CISG 33; 47; 49; 73
Spain: Audiencia Provincial de Barcelona, Division 16
3 November 1997
T, SA v. E
Original in Spanish
Published in Spanish: [1998] 2 Revista Jurídica de Catalunya, Jurisprudencia, 411;
Jurisprudencia Española: http://www.uc3m.es/cisg/espan3.htm

A Spanish buyer ordered from a German seller a set of parts for use in the buyer's production process, it being agreed that the goods would be delivered by instalments. The seller consistently failed to meet the delivery deadlines so that three of the instalments were delivered after the agreed dates, with delays of between four and eight weeks and inevitable disruption of the buyer's production process. In view of the situation, the buyer declared the contract avoided in respect of the outstanding future instalments within a period of 48 hours after delivery of the third overdue instalment.

The Court held that the buyer's tolerance of the late delivery of the three initial instalments was equivalent to the granting of an "additional period of time" to the seller, in accordance with article 47 CISG. However, the delay incurred and its effects on the buyer's production process were deemed by the Court to amount to a "fundamental breach", in conformity with articles 33 and 49. The Court ruled that, in accordance with articles 49(2) and 73, such fundamental breach entitled the buyer to avoid the contract and prevent the handing over of future outstanding instalments. The 48-hour period within which the buyer cancelled following delivery of the last late instalment received was deemed to be a "reasonable time" within which to declare the contract avoided.

Case 247: CISG 31; 67
Spain: Audiencia Provincial de Córdoba, Division 3
31 October 1997
Parties unknown
Original in Spanish
Published in Spanish: [1998] Revista General de Derecho, No. 648, 12077;
Jurisprudencia Española: http://www.uc3m.es/cisg/espan4.htm

Under a contract of sale agreed between an Italian seller and a Spanish buyer in accordance with the current Incoterms, the goods forming the subject of the contract arrived at the place of destination with certain defects. When the goods were loaded on the vessel at the Italian port, the captain of the vessel signed the document bearing the remark "clean on board", i.e. in perfect condition.

The Court held that, in view of the type of contract entered into between the seller and the buyer regarding the delivery and carriage of the goods, the liability of the seller, in accordance with articles 31 and 67 of the CISG ceased when the goods were taken on board a vessel loaded at the port of origin. As from that moment, the risks relating to the sold items passed to the buyer, irrespective of whether the buyer had arranged the insurance of the goods sold and transported.

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V.99-89277

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 248: CISG 25; 39; 49(1)(a); 74
Switzerland: Schweizerisches Bundesgericht (I. Zivilabteilung); 4C.179/1998
28 October 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 179

The German sellers, plaintiffs, delivered frozen meat by ship to Egypt and Jordan for a Swiss buyer, defendant. The buyer claimed lack of conformity of the goods and refused to pay the purchase price. The lower court ruling in favour of the sellers was confirmed by the appellate court. The buyer appealed further to the superior appellate court.

The issues before the court were whether the buyer had a right to declare the contract avoided and whether the buyer was entitled to damages for the loss of clientele, which the buyer claimed had resulted from the seller's breach of contract.

The court held that the difference in quality between that as had been agreed and that as was delivered was not significant enough to give the buyer a right to declare the contract avoided, even though experts estimated that the decrease in value of the goods, which were too fat and too wet, amounted to 25.5 per cent. The court stated that the CISG operates from the principle that the contract shall be avoided only in exceptional circumstances and that the right to declare a contract avoided is the buyer's most serious remedy. Whether or not this remedy is justified has to be determined by taking into account all the relevant circumstances of the particular case. Such factors include the buyer's ability to otherwise process the goods or to sell them, even at a lower price. The court confirmed the lower court's finding that the buyer had had such alternatives and therefore denied the buyer the right to declare the contract avoided. The buyer could merely avail itself of a reduction in price of 25.5 per cent (articles 25 and 49(1)(a) CISG).

In regard to the second issue, the lower appellate court had held that the buyer's loss of clientele as a result of the breach was not foreseeable and that the seller could be expected to undertake such an exceptional risk only if representations were made during the negotiations and if the seller had had an opportunity either to decline responsibility or take it into account when fixing the price. By contrast, the superior appellate court held that such loss was foreseeable, particularly since the buyer was a wholesale trader in a sensitive market and had no alternative in order to carry out its obligation in time. Under the circumstances of the present case, no specific agreement as to the seller undertaking such risk was needed (article 74 CISG). For these reasons, the court found that the buyer was entitled to damages but referred the case back to the lower court as to the amount of the damage award.

Not at issue before the superior appellate court was 1) the holding by the lower court that a notice of lack of conformity made within 7 to 17 days was in time, given that the goods in question concerned meat that was frozen, not fresh (article 39 CISG); and 2) the ruling that, as the CISG does not expressly deal with the burden of proof, such lacuna must be filled by interpretation of the Convention.

Case 249: CISG 39(2)
Switzerland: République et Canton de Genève, Cour de Justice; C/21501/1996
10 October 1997
Original in French
Published in French: Bettschart (ed.), Les Ventes Internationales: Journée d'étude en l'honneur du professeur Karl H. Neumayer (Cedidac Nr. 36) (Lausanne) (1998) 141
Abstracts published in German: [1998] Schweizerische Juristen-Zeitung 146; [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 182
Commented on in French: Witz, [1998] Recueil Dalloz, 35ème Cahier, Sommaires Commentés 316; and in German: Will, [1998] Schweizerische Juristen-Zeitung 146

A Swiss seller, defendant, delivered acrylic cotton to a French buyer, plaintiff, who notified the seller of the lack of conformity of the goods. The buyer commenced proceedings in Switzerland within two years but after expiry of the one-year limitation period under Swiss domestic law. The issue before the court was how to deal with the conflict between article 39(2) of the CISG, which requires the buyer to give the seller notice of the lack of conformity within two years, and the shorter limitation period under Swiss domestic law.

The court of first instance resolved the conflict by replacing article 210 of the Swiss Code of Obligations (CO) with article 127 CO, i.e. the general rule of limitation pursuant to which the period of limitation is ten years unless otherwise provided by law.

The appellate court chose a different approach. It noted that there was a distinction to be made between an action for breach of warranty under Swiss domestic law, which had to be brought within one year, and a claim for lack of conformity under the CISG, which had to be brought within two years. The court first referred to article 1(2) of the Swiss Civil Code and noted that the judge, in view of an issue not resolved by the law, has to decide according to the rules which the judge would lay down if the judge had to act as legislator. The court then searched for a solution as close as possible to article 210 CO, while respecting the CISG at the same time. It brought into line the rules of Swiss domestic law with the CISG by extending to two years the one-year period prescribed under article 210 CO.

The decision has not yet become final, as an appeal to the superior appellate court is pending.

Case 250: CISG 6
Switzerland: Handelsgericht des Kantons Zürich; HG960181
16 December 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 184

A Swiss seller, plaintiff, sold designer watches to a German buyer, defendant. Delivery of the goods was effected through an overnight carrier, who placed the parcel in front of the buyer's closed offices early in the morning. The buyer claimed never to have received the goods and the seller sued for the purchase price.

The issue before the court was whether or not the CISG was applicable. Although the parties had excluded the CISG in general contract terms, the defendant later questioned this exclusion. By

analogy with article 100(1) of the Swiss Code of Obligations, pursuant to which an agreement excluding a party's liability for gross negligence or intentional wrongdoing is void if made in advance, the defendant argued that the same rule should apply to an agreement excluding the CISG. The court rejected this reasoning and noted that the CISG prevails unless the legislator enacts a superseding rule. It found that the cited article of Swiss domestic law was not such a rule. As there were no other reasons hindering the parties' exclusionary clause, the CISG was not applicable (article 6 CISG).

Case 251: CISG 1(1)(b); 4; 8; 35; 38(1); 39(1); 40; 73
Switzerland: Handelsgericht des Kantons Zürich; HG930634
30 November 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 185

A Swiss seller, plaintiff, sold lambskin coats to a Liechtenstein buyer, defendant, which were to be delivered in Belarus. After some of the coats were delivered, the buyer gave notice of lack of conformity to the seller, who had not previously seen the goods and therefore examined them at the buyer's request, and declared the contract avoided. The buyer demanded reimbursement of payments that had been made and the seller sued for the remainder of the full contract price.

The court held that the CISG was applicable even though Liechtenstein is not a Contracting State. Under the rules of private international law in Switzerland, in conjunction with article 3(1) of the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, the contract was governed by the law of the State of the seller's habitual residence, so that in this case the CISG as a part of Swiss law was applicable (article 1(1)(b) CISG).

The court characterized the sales agreement as a contract for the supply of goods by instalments and held that, even though the instalment deliveries were not of the same kind of goods, article 73 of the CISG, which differed in that regard from Swiss law, was applicable.

The court held that the buyer had lost its right to rely on a lack of conformity as a defense because examination of the goods and notification had not been carried out in time. It found that a period of "one week to ten days" for the examination and "a rather generous period" of two weeks for notification would have been adequate; the buyer could have easily examined the coats and could have limited the examination to random samples. The court stated that the period contemplated under the CISG has as its purpose to enable the buyer to notify the seller of any defects before the goods are resold; also, from the point of view of a functioning international trading system, there is no reason to extend these time periods for examination and notice (articles 38(1) and 39(1) CISG). Furthermore, the court found that the facts did not support the buyer's argument that the seller had known of and had not disclosed the lack of conformity. It held that if a seller examines the goods at the request of the buyer, the seller does not thereby waive its right to rely on late notification (article 40 CISG). The fact that the seller had invoked late notification after having examined the goods was not contrary to the principle of good faith (article 8 CISG).

The court found that the fact that some of the coats had been identified with article numbers other than as had been originally agreed was not a defect as alleged by the buyer, but had been arranged by supplementary agreement between the parties. It stated that, even if this were found to be a defect, although the seller must deliver goods that conform to the contract, such a lack of conformity does not rise to the level of a breach of contract if the goods are of equal value and their utility is not reduced (article 35 CISG).

In addition, the court held that questions concerning the burden of proof are not governed by the Convention, but that due to its underlying systematic structure, certain principles may be inferred. As liability for the defect of goods is a critical aspect of the seller's obligations under the contract, it is incumbent upon the seller to prove the absence of defects at the time of passing the risk. The buyer bears the burden of proof for reasonable examination and notice of non-conformity, and, after having accepted the goods without giving notice of non-conformity, the burden of proof for the existence of any defects at the time of passing the risk shifts to the buyer (article 4 CISG).

Case 252: CISG 35; 39(1)
Switzerland: Handelsgericht des Kantons Zürich; HG960527
21 September 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 188

An Italian printer, plaintiff, produced books and an art exhibition catalogue for a Swiss publisher, defendant. The buyer refused to pay the purchase price, claiming lack of conformity.

The court held that the buyer had failed to comply with its duty to notify the seller of the lack of conformity with sufficient specificity. Fulfillment of the requirement of specificity, the court explained, should put the seller in the position of having been adequately informed as to the lack of conformity. Notification in general terms is therefore not enough, although this requirement should not be exaggerated. A more precise description can be expected from a specialist than from a lay person (article 39(1) CISG). Moreover, the court rejected the buyer's argument as to the lack of conformity; of several alleged defects, the proven defect amounted to one line being out of place in the catalogue, which did not in any way impede the legibility of the text. The court stated that, although a seller can be held liable even for a non-essential lack of conformity, this is only if the defect lowers the value of the goods (article 35 CISG).

Case 253: CISG [4]
Switzerland: Repubblica e Cantone del Ticino, La seconda Camera civile del Tribunale d'appello; 12.97.00193
15 January 1998
Original in Italian
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 189

An Italian buyer, plaintiff, bought from a Swiss seller, defendant, 300 tons of cacao beans which were shipped from Ghana. The beans were to contain fat of at least 45 per cent and

acidity of no more than 7 per cent. As provided in the contract of sale, payment was made against documents, which included a certificate of conformity. Tests of the beans after delivery in Italy, however, revealed that their values were not as had been certified. In litigation commenced by the buyer in Switzerland for recovery of the purchase price, it was not possible to determine whether the goods were already defective when handed over to the carrier.

On the issue of which of the parties had to bear the burden of proof, the court stated that, as a matter of principle, attribution of the burden of proof is to be determined by the law applicable on the merits, which, in this case, was the CISG. The court noted that the CISG does not contain any particular rule on the burden of proof as to the conformity of goods. Furthermore, it noted that views on this matter as expressed by scholars are divided: according to some, the CISG implies that the buyer should bear the burden, whereas others would attribute the burden in accordance with domestic law. The court was able to leave the issue open because, under the law of the forum as well as under the CISG, the buyer had to bear the burden of proof.

Case 254: CISG 74; 78
Switzerland: Handelsgericht des Kantons Aargau; OR.97.00056
19 December 1997
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 192

A German seller of garments, plaintiff, sued the Swiss buyer, defendant, for the purchase price, interest, and its legal costs in both Germany and Switzerland.

The court rendered a default judgment in favour of the seller, comprising the purchase price and interest (article 78 CISG). The interest rate was determined in accordance with German law, which had been chosen as applicable law by the parties. The seller was also awarded as damages the legal expenses of its lawyers in Germany and Switzerland. The court stated that all costs incurred in the reasonable pursuit of a claim are refundable, which included retaining a lawyer in the country of each party (article 74 CISG).

Case 255: CISG [4]
Switzerland: Kantonsgericht Kanton Wallis (Zivilgerichtshof I); CI 98 9
30 June 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 192

An Italian seller, plaintiff, sued a Swiss buyer, defendant, for payment of the delivery of granite materials. While neither the application of the Convention nor the payment obligation in principle were in dispute, the question arose whether payment had to be made in Italian lire or in Swiss francs.

The Court noted that the CISG does not deal with the currency in which the purchase price has to be paid, which is an issue to be determined in accordance with the law applicable to the

contract [article 4 CISG]. In the present case, the contract was governed by Italian law, pursuant to which the seller had the right to receive payment in Italian lire.

Case 256: CISG 7(2); 33; 39(1)
Switzerland: Tribunal Cantonal du Valais (IIe Cour Civile); CI 97 288
29 June 1998
Original in French
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 193

The plaintiff, an Italian clothing sales company, filed a lawsuit against the buyer, a Swiss company, requesting payment of the purchase price. The defendant buyer pleaded late delivery and lack of conformity of the goods.

The court found that the parties never had agreed on a final date of delivery and that the delivery had taken place within a reasonable time after the conclusion of the contract (article 33 CISG). It held that notification of lack of conformity given to the seller seven to eight months after delivery was by far too late (article 39(1) CISG). The interest rate on the purchase price was determined by application of the law governing the contract, which in this case was Italian law (article 7(2) CISG).

Case 257: CISG 53
Switzerland: Tribunal Cantonal du Vaud; 01 95 0015
24 December 1997
Original in French
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 193

A Danish seller, plaintiff, delivered furniture to a Swiss buyer, defendant, and commenced a lawsuit requesting payment of the purchase price.

The court did not find it necessary to determine whether the case fell within the scope of the CISG since both the CISG (article 53) and Swiss domestic law (article 211 of the Swiss Code of Obligations) led to the same result, namely, that the buyer was bound to pay the price. (Nevertheless, the action was dismissed for procedural reasons.)

Case 258: CISG 1(1)
Switzerland: Repubblica e Cantone del Ticino, La seconda Camera civile del Tribunale d'appello; 10.96.00029
15 December 1998
Original in Italian
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 194

A Chilean company, plaintiff, brought a lawsuit against a company, defendant, that had its place of business in the British Virgin Islands.

The court held that the CISG did not apply, because the relevant sales contract was concluded not with the defendant, but with another company that, although allied with the defendant, had its place of business in Chile. The Convention applies only to contracts between parties in different States (article 1(1) CISG).

Case 259: CISG 4; 8
Switzerland: Kantonsgericht Freiburg; Apph 27/97
23 January 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 194

A German producer of machinery, plaintiff, sold a commercial laundry machine to a Swiss buyer, defendant, and delivered the machine to the final customer in Hong Kong. The buyer refused to pay the price, declaring a setoff with claims arising out of a related consulting agreement with the seller. While the payment obligation under the sales contract, which was governed by the CISG, was not in dispute, the existence and the amount of the setoff were under controversy.

The first issue was whether a standard set of General Terms and Conditions, pursuant to which the setoff claim would have been excluded, formed part of the sales contract. The court held that this issue was not governed by the CISG, and under German domestic law the General Terms and Conditions did not form part of the contract (article 4 CISG).

While stating that the CISG does not deal with setoff (article 4 CISG), the court nevertheless referred to article 8 of the CISG in construing the consulting agreement. This uniform rule, the court noted, coincides with corresponding principles under German and Swiss domestic law. The court concluded that if the interpretation of a statement made by a contracting party coincides with the interpretation of statements made by the other party, a corresponding intent of the parties will be assumed. If, however, interpretation of statements made by both parties does not lead to a congruent result, the intent of the parties has to be elicited in accordance with the principles of Swiss domestic law.

Case 260: CISG 2(d)
Switzerland: République et Canton de Genève, Cour de Justice (Chambre civile); C/8157/1992
9 October 1998
Original in French
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 195

A dispute concerning a sale of the shares of a company incorporated in Cote d'Ivoire arose between a Panamanian company and several persons domiciled in the United Kingdom.

The court noted that the CISG was not applicable because the sale of stocks, shares, investment securities, negotiable instruments or money is excluded from the scope of application of the Convention (article 2(d) CISG).

Case 261: CISG 1(1)(a); 7(1); 10(a); 32(2); 63(1); 64(1)(b); 72(1); 81(1); 81(2); 84(1)
Switzerland: Bezirksgericht der Saane (Zivilgericht); T 171/95
20 February 1997
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 195

An Austrian company, plaintiff, entered into a contract for the purchase and transport of spirits to Russia with the Swiss branch of a company that had its headquarters in Liechtenstein. The contract was never performed because a dispute arose among the parties regarding the mode of transport and the final date of performance. The Austrian buyer sued the Swiss seller for repayment of an advance payment, while the defendant claimed damages for breach of contract.

The court held that, even though Liechtenstein was not a Contracting State, the Convention was applicable because the Swiss branch, not the Liechtenstein headquarters, was the place of business that had the closest relationship to the contract and its performance (articles 1(1)(a) and 10(a) CISG).

The factual issue in dispute was whether the parties had agreed that the goods were to be transported by truck, as the buyer claimed, or whether the choice of the mode of transport had been left to the seller. The court held that, as the CISG does not contain rules on the burden of proof, it is necessary to rely on the rules of private international law of the forum, which, in this case, led to the application of Swiss domestic law (article 7(2) CISG). Since the buyer was unable to meet the burden of proof evidencing an agreement to transport the goods by truck, the court found that the choice of transportation mode had been left to the seller (article 32(2) CISG).

The court held that, since the buyer had not established a letter of credit as the parties had agreed, the seller had the right to declare the contract avoided after having fixed an additional period of time for performance (articles 63(1) and 64(1)(b) CISG). It rejected the argument made by the buyer under article 72(1), that, because the seller had held back delivery of the goods, the buyer was entitled to declare the contract avoided. Since avoidance of the contract released both parties from their obligations under it (article 81(1) CISG), the buyer was entitled to repayment of its advance payment together with interest (articles 81(2) and 84(1) CISG) calculated in accordance with Swiss law (article 7(2) CISG). The seller, on the other hand, was awarded only part of its claim for damages. Noting that the CISG does not address how damages are to be calculated if the amount cannot be determined, the court applied Swiss domestic law, which was found to be applicable under article 3(1) of the Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

Case 262: CISG 1(1)(b); 3(1); 39(1); 58(1); 58(3)
Switzerland: Kanton St. Gallen, Gerichtskommission Oberrheintal; OKZ 93-1
30 June 1995
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 197

In 1990, a contract was entered into between an Austrian seller, plaintiff, and a Swiss buyer, defendant, for delivery and installation of four sliding gates. On grounds of lack of conformity, the buyer refused to pay the purchase price and the seller commenced proceedings.

The first issue was whether the CISG was applicable, since, in 1990, the CISG had entered into force in Austria but not yet in Switzerland. The court rejected the buyer's argument that all of the facts of the case pointed to Swiss law, noting that, therefore, Swiss law would apply only if the parties had so chosen. It held that, pursuant to the private international law rules of Switzerland, the contract was governed by Austrian law and that, therefore, the CISG was applicable (article 1(1)(b) CISG).

The agreement was characterized as a contract for the supply of goods to be manufactured (article 3(1) CISG). The court did not accept the buyer's defense, namely, that the reasonable period of time for notification of lack of conformity had not begun to run since the seller had not finished its work. Instead, the court found that delivery had taken place even though at the time of the first inspection, in which both parties had been involved, the work was not entirely completed (article 58(3) CISG). The minor improvements that were made thereafter, although necessary, did not affect the time of delivery in the sense of article 58(1) of the CISG. The court held that the notice of the lack of conformity, which had been given one year after delivery, was obviously too late (article 39(1) CISG).

Case 263: CISG 39(1)
Switzerland: Kanton St. Gallen, Bezirksgericht Unterrheintal; EV.1998.2 (1KZ.1998.7)
16 September 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 198

A German bank, plaintiff, acquired by assignment a claim from a German seller against a Swiss buyer, defendant, arising from the delivery of furniture. When the buyer refused to pay, based on an alleged lack of conformity, the bank commenced legal proceedings.

The court held that the notice of lack of conformity, which was given over one year after delivery of the goods, was given far too late (article 39(1) CISG).

Case 264: CISG 6
Switzerland: Bezirksgericht Weinfelden
23 November 1998
Original in German
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 198

A German seller, plaintiff, sold milking machines to a Swiss buyer, defendant, and the parties agreed that the contract was to be governed by German law.

The court held that, although the CISG is part of German law, when choosing German law, the parties had in mind not the CISG but the German Civil Code. The court therefore applied the rules of the German Civil Code.

Case 265: CISG 1(1)(a); 47; 62; 73(2); 77
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. Vb/97142 of 25 May 1999
Original in Hungarian
Unpublished

An Austrian buyer, defendant, and a Hungarian seller, claimant, signed a contract for the purchase and sale of sour cherries. A part of the goods had already been delivered when the price of cherries rose significantly. The seller was willing to bear the consequences of the increase in price for the goods that had already been delivered, but terminated the contract in respect of the non-delivered goods. The seller claimed that the buyer had given its oral consent to the termination. The buyer denied having given such consent and did not pay for the delivered goods. The buyer claimed that non-delivery of the goods outstanding under the contract had caused the buyer more damage than the value of the goods it had received. The seller claimed payment of the purchase price and the buyer counterclaimed for the damage that it had sustained due to non-delivery.

As each party had its place of business in a Contracting State, the tribunal stated that the Convention was applicable (article 1(1)(a) CISG). The tribunal held that the claim was partially founded, so the buyer had to pay for the goods already delivered (article 62 CISG). As the seller was unable to prove the buyer's consent to the termination of the contract, the tribunal found that the seller was responsible for the damages of the buyer and the buyer was entitled to make a covering purchase (article 47 CISG). The buyer was entitled to terminate the contract concerning the non-delivered part of the goods (article 73(2) CISG). On the other hand, the buyer did not fulfill its duty to mitigate its loss (article 77 CISG). The tribunal held that both the claim and counterclaim were only partially founded and therefore divided the damage between the parties.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 266: MAL 4
Hungary: Arbitration Court attached to the Hungarian Chamber of Commerce and Industry
Arbitral award in case No. Vb/97142 of 25 May 1999
Original in Hungarian
Unpublished

A dispute arose between an Austrian buyer and a Hungarian seller over a contract for the purchase and sale of sour cherries.

Although the contract did not contain a valid arbitration clause, the tribunal found that it had jurisdiction to hear the matter. This was because the seller had submitted its claim to the tribunal and the buyer, without stating any objection concerning jurisdiction, put forward its defence (article 4 MAL).

(For the decision on the merits under the CISG, see Case 265).

Case 267: MAL 33; 34
Zimbabwe: Harare High Court (Judge Devittie); Judgment No. HH-231-98
29 March and 9 December 1998
Zimbabwe Electricity Supply Commission v. Genius Joel Maposa
Original in English
Unpublished

The employer suspended from duty one of its senior employees pending disciplinary hearings into alleged misconduct. Suspension was initially with full pay, and subsequently without pay effective 5 February 1997. The employment dispute was submitted to arbitration. The tribunal awarded the employee his salary and benefits together with interest from 24 December 1996. The employer sought to have the award set aside on the basis that the arbitrator had made a reviewable factual error in calculating the back-pay, and that error, under Zimbabwe's Arbitration Act 1996, Article 34 (MAL, Article 34), rendered the award contrary to public policy.

The court considered that an award which was contrary to public policy would be one that would undermine the integrity of the system of international arbitration put in place by the model law and that this would include cases of fraud, corruption, bribery and serious procedural irregularities. The court held that, as in this case it was not suggested that any moral turpitude attached to the arbitrator's conduct, the award could not be said to be in conflict with public policy (MAL, Article 34). It found that the error was clearly one of computation for which the model law makes adequate provision; a party may request the tribunal to correct such errors and, if necessary, the time limits for making such a request may be extended (MAL, Article 33).

III. ADDITIONAL INFORMATION

Addendum

(Arabic, Chinese, English, French, Spanish and Russian texts)

Case 46
Commented on in German: Ferrari, [1998] Zeitschrift für Europäisches Privatrecht 162

Case 48
Commented on in German: Ferrari, [1998] Zeitschrift für Europäisches Privatrecht 162

Case 54
Commented on in German: Ferrari, [1998] Zeitschrift für Europäisches Privatrecht 162

Case 219
Published in French: [1998] Revue valaisanne de jurisprudence 140

Case 221
Abstract published in German: [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 190

Case 241
Commented on in French: Witz, [1999] Recueil Dalloz, 26ème Cahier, Jurisprudence 383

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(CLOUT)

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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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V.99-90375

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 268: CISG 1(1)(a); 8(1); 31
Germany: Bundesgerichtshof; VIII ZR 154/95
11 December 1996
Original in German
Published in German: 134 Entscheidungen des Bundesgerichtshofes in Zivilsachen 201; [1997] Neue Juristische Wochenschrift 870; [1997] Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 519; [1997] Monatsschrift für Deutsches Recht 387; [1997] Recht der Internationalen Wirtschaft 421; [1997] Juristenzeitung 797; [1997] Praxis des Internationalen Privat- und Verfahrensrechts 348;[1997] Europäisches Wirtschafts- und Steuerrecht 105; [1997] Wertpapier-Mitteilungen 985; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/225.htm
Abstract published in German: [1997] Der Betrieb 572; [1997] Familie und Recht 122; [1997] Neue Juristische Wochenschrift - Rechtsprechungsreport 636; [1997] Entscheidungen zum Wirtschaftsrecht 455; [1998] Schweizerische Zeitschrift für Internationales und Europäisches Recht 87
Commented on in German: Mankowski, [1997] Wirtschaftsrechtliche Beratung 330; Geimer, [1997] Entscheidungen zum Wirtschaftsrecht 455; Huber, [1997] Juristenzeitung 799; Kronke, [1997] Praxis des Internationalen Privat- und Verfahrensrechts 350; Grunsky, [1997] Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen ZPO § 256 No.195; Hess, Entscheidungssammlung zum Wirtschafts- und Bankrecht VII B Art 21 EuGVÜ 1.97

A German seller, plaintiff, delivered almond paste to a French buyer, defendant. The seller sought from the German court a declaration of non-obligation to pay damages and, thereafter, the buyer brought an action for damages in a French court. One of the issues for determination was whether the German court had jurisdiction.

The appellate court had stated that, under article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is based on the place of performance of the contract. Since both Germany and France were Contracting States to the CISG, it was applicable to determine the place of performance (article 1(1)(a) CISG), according to which the place of performance would have been at the seller's place of business in Germany (article 31 CISG). At issue was whether the parties had derogated from this general principle by various communiques in which the price had been quoted, "duty unpaid, untaxed, delivery being free to the door of the place of the buyer's business".

The appellate court had held that these descriptive statements, which had been made by the parties in conjunction with the price, could have been understood as related to transportation costs and allocation of risk and, having regard to the need for interpretation in accordance with the view and comprehension of the recipients, had not been intended by the parties to alter the place of performance (article 8(1) CISG). This ruling was upheld by the Supreme Court.

Case 269: CISG 1; 4
Germany: Bundesgerichtshof; I ZR 5/96
12 February 1998
Original in German
Published in German: http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/343.htm
Head Note published in German: [1998] Eildienst Bundesgerichtliche Entscheidungen 445; [1999] Schweizerische Zeitschrift für Internationales und Europäisches Recht 199

An insurer, plaintiff, sued a carrier, defendant, for damages resulting from an accident. The claim involved rights which had been assigned to the plaintiff by a third party.

The court held that the provisions of the CISG were not relevant in this case. Although in general the Convention is applicable to sales of goods requiring shipment, the matters in dispute in this case concerned the contract of carriage, which as such fell outside of the scope of the Convention. The court also stated that, even if the Convention had been applicable to the contract in question, the matters in dispute, which concerned assignment of claims, assignment by operation of law and realization of third-party damages, were not matters governed by the Convention (articles 1 and 4 CISG).

Case 270: CISG 1(1); 8(2); 8(3); 38; 39
Germany: Bundesgerichtshof; VIII ZR 259/97
25 November 1998
Original in German
Published in German: [1999] Monatsschrift für Deutsches Recht 408; [1999] Neue Juristische Wochenschrift 1259; [1999] Der Betrieb 687; [1999] Wertpapier-Mitteilungen 868; [1999] Recht der Internationalen Wirtschaft 385; [1999] Aussenwirtschaftliche Praxis 176; [1999] Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 5; [1999] Praxis des Internationalen Privat-und Verfahrensrechts 377; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/353.htm
Head Note published in German: [1999] Eildienst: Bundesgerichtliche Entscheidungen 105; [1999] Entscheidungen zum Wirtschaftsrecht 257
Commented on in German: Schlechtriem, [1999] Entscheidungen zum Wirtschaftsrecht 257; Magnus, Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 5; Otte, [1999] Praxis des Internationalen Privat- und Verfahrensrechts 352; Escher, [1999] Recht der Internationalen Wirtschaft 495

A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products by the buyer's business partner, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller. The appellate court had dismissed the buyer's claim (see Case No. 230) and the buyer appealed further.

The Supreme Court reversed the appellate court's decision and allowed the buyer's claim. It confirmed that the CISG is applicable if the parties have chosen, even by means of standard contractual provisions, the law of a Contracting State to govern their contract (article 1(1)).

The court found that the seller had waived its right to rely on articles 38 and 39 of the CISG. It stated that a seller can waive its rights not only expressly but also in an implied manner. The preconditions for an implied waiver are specific indications that would cause the buyer to understand the seller's action as a waiver. The fact that a seller enters into negotiations over the lack of conformity of the goods need not necessarily be regarded as a waiver, but should be considered in conjunction with the circumstances of each case. In this case, negotiations as to the amount of damages and the manner in which damages should be paid had taken place between the parties over a period of 15 months, during which time period the seller had not reserved the right to rely on articles 38 and 39 of the CISG. Furthermore, at the buyer's request, the seller had paid the expenses of an expert. Moreover, the seller had offered damages amounting to seven times the price which the seller had received for the surface-protective film. The court held that, from the buyer's point of view (article 8(2) and (3) CISG), it could only be understood that the seller would not, at a later point of time, rely on articles 38 and 39 of the CISG.

The court left open the issues of whether examination under article 38 of the CISG should have included a test treatment by the buyer and whether the buyer had had a reasonable excuse for failure to give notice within the required period of time (article 44 CISG). It also left open the issue of whether the seller had lost the right to rely on the provisions of articles 38 and 39 by means of article 40 of the CISG.

Case 271: CISG 7; 77; 79
Germany: Bundesgerichtshof; VIII ZR 121/98
24 March 1999
Original in German
Published in German: [1999] Neue Juristische Wochenschrift 2440; [1999] Der Betrieb 1442; [1999] Recht der Internationalen Wirtschaft 617; [1999] Wertpapier-Mitteilungen 1466; [1999] Juristenzeitung 791; [1999] Monatsschrift für Deutsches Recht 1009; [1999] Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 6 and No. 7; Entscheidungssammlung zum Wirtschafts- und Bankrecht, IV F Art 79 CISG 1.99; [1999] Recht der Landwirtschaft 250; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/396.htm
Translated into English: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html
Head Note in German: [1999] Eildienst: Bundesgerichtliche Entscheidungen (EBE/BGH), BGH-Ls 323/99
Commented on in German: Schlechtriem, [1999] Juristenzeitung 794; Stoll, [1999] Lindenmaier-Möhring: Nachschlagewerk des Bundesgerichtshofs in Zivilsachen CISG No. 6 and No. 7; Magnus, Entscheidungssammlung zum Wirtschafts- und Bankrecht, IV F Art 79 CISG 1.99;
Commented on in English: http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990324g1.html

The seller, the unsuccessful party in Case No. 272, appealed to the Supreme Court.

The court confirmed the seller's liability without deciding whether or not article 79 was applicable, stating that even if it were applicable, it would not exclude the seller's liability since the defect in the wax was not an impediment beyond the seller's control. Although it was not the case

here, the court stated that when defects of the goods are caused by the seller's supplier, the seller is only exempt from liability under article 79 if the failure to perform is due to an impediment beyond the control of the seller and each of the seller's suppliers. Thus, the court left open the question of whether or not article 79 of the CISG can be raised as a defense against all kinds of non-performance, including the delivery of defective goods. The court also pointed out that the exemption provided under article 79 does not alter the allocation of risk. Liability of the seller resulted from its failure to comply with its obligation to deliver conforming goods; it made no difference whether the defect was the fault of the seller or its supplier.

However since the appellate court had failed to consider whether there had been any failure on the part of the buyer to mitigate its loss, the Supreme Court set aside the judgement and remanded the case back to the appellate court. It noted that, as failure to mitigate by one party could lead to the total exclusion of liability of the other party, in such a case, German law would require that the matter be considered in conjunction with the decision on the merits and not in a separate proceeding concerning the amount of damages (article 77 CISG). As this was a question of procedural rather than substantive law, the court said that it was not governed by article 7 of the CISG but rather, by the relevant provisions of German law.

Case 272 : CISG 8(3); 35(1); 45(1)(b); 74; 79(1); 79(2)
Germany: Oberlandesgericht Zweibrücken; 8 U 46/97
31 March 1998
Original in German
Unpublished

A German seller, defendant, sold vine wax for the treatment of grapevine stocks to an Austrian buyer, plaintiff. When some plants were damaged after treatment with the wax, the buyer claimed lack of conformity of the goods and sued the seller for damages. The seller denied liability, arguing that it had acted purely as an intermediary and that the failure of the product was due to defective production by its supplier, an impediment that was beyond its control.

The court held that the buyer was entitled to claim damages according to article 45(1)(b) of the CISG; prerequisites for a claim under this article are failure of the seller to perform its obligation, causation and damage, which must be proven by the claimant. By contrast, if the seller seeks to rely on article 74 of the CISG, the seller must prove that it was unable to foresee the damage.

The court found that the goods delivered by the seller did not meet the demands of practice and were therefore not in conformity with the contract (article 35(1) CISG). It then considered whether the seller's liability was excluded by an exemption clause contained in the seller's general terms and conditions of sale. It held that, as the CISG does not provide specific requirements for the incorporation of standard terms and conditions into a sales contract, whether such terms have become part of the contract must be determined by the application of article 8 of the CISG. In this case, there had been no negotiations or established trade usage between the parties by which the terms and conditions might have become part of the contract (article 8(3) CISG). Apart from that question, the court also held that, as the CISG does not provide rules on the validity of an exemption clause, this must be decided by recourse to the national law that is found to be applicable according to private international law rules. The court found that, under German law, the complete exclusion of liability, irrespective of the degree of fault, would have been void.

The court noted that delivery of defective goods may constitute an impediment under article 79(1) of the CISG. It also noted that, in order to be exempted from non-performance, the seller would have to prove that the non-performance was due to an impediment beyond the seller's control, that the impediment was not taken into account at the time of the conclusion of the contract or that the impediment or its consequences could neither have been avoided nor overcome by a reasonable seller (article 79(1) CISG). The court held that, in the given circumstances, the defect had not been beyond the seller's control; despite the on-going business relationship, it was not reasonable for the seller simply to have relied on its supplier's product without tests, because it was a newly developed product. The court further held that, even if the seller had acted only as an intermediary, it was still liable for the lack of conformity of the goods. In such cases, the supplier of the intermediary could not be regarded as a third party according to article 79(2) of the CISG.

The seller appealed to the Supreme Court (see Case No. 271).

Case 273: CISG 8; 39; 44; 50; 53; 57(1)(a); 59; 62; 80
Germany: Oberlandesgericht München; 7 U 2070/97
9 July 1997
Original in German
Published in German: http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/282.htm

An Italian seller, plaintiff, made a series of deliveries of leather goods to a German buyer, defendant. The seller sued the buyer for the total, undiscounted, purchase price and charges for dishonoured cheques. The buyer disputed the amount of the claim, arguing that partial payment had already been made, that two invoices had not been received, and that the goods were defective. The buyer also claimed a set-off, on the grounds that certain goods had not been delivered to its client. The lower court granted the seller's claim and the buyer appealed.

The court dismissed the appeal, finding that the buyer's claim for the full purchase price was justified (articles 53 and 62 CISG). Although it was clear by ordinary interpretation that the parties had agreed to a discounted payment arrangement (article 8 CISG), because the buyer had not met the terms of that arrangement, none of the buyer's grounds to reduce the payment owed were acceptable. Moreover, the court stated that the buyer had the obligation to make payment of the purchase price at the seller's place of business and bore the burden of proof that it had been fulfilled (article 57(1)(a) CISG). Whether or not the buyer had received all of the invoices was not significant, since the purchase price had to be paid on the due date without further demand (article 59 CISG). The court found that, as the buyer had not given the seller notice sufficiently specifying the nature of the lack of conformity (article 39 CISG) and had no reasonable excuse for the failure to do so (article 44 CISG), the buyer was not entitled to reduce the purchase price (article 50 CISG). Furthermore, the court held that the buyer had to reimburse the seller for the cost of the dishonoured cheques and stated that payment obligations under article 57 of the CISG also include payment formalities.

The court held as admissible the buyer's claim for set-off because the monetary claims of both parties were subject to the CISG. The claim was dismissed, however, since the seller had no obligation to perform when the buyer did not pay the purchase price (article 80 CISG).

Case 274: CISG 1(1)(b); 57(1)(a)
Germany: Oberlandesgericht Celle; 9 U 87/98
11 November 1998
Original in German
Unpublished

A Portuguese seller of orange juice assigned its claim against a Dutch buyer, defendant, to a Panamanian company, plaintiff, which sued for the outstanding purchase price. The defendant sought set-off with a purchase money claim assigned to it by a German seller, which originated from a contract of sale with the Panamanian plaintiff. The court of first instance allowed the claim against the defendant, but denied having jurisdiction as to the set-off. The defendant appealed.

The court of appeal confirmed the judgement. According to article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is dependant upon the place of performance being in Germany. Under the sales contract that was the source of the set-off claim, private international law led to the application of German law, which included the CISG (article 1(1)(b) CISG). The court stated that, although the place of performance originally had been the place of business of the German seller (the assignor), as a result of the assignment, it had changed to the place of business of the Dutch assignee (article 57(1)(a) CISG). Although the purchase money claim itself remained unchanged when it was assigned, the change of the creditor changed the manner of discharge and led to a change in the place of performance. Consequently, a German court could not have jurisdiction to hear the set-off claim.

Case 275: CISG 25; 45(1)(b); 47(1); 49(1)(a); 49(1)(b); 51(1); 58(1); 71(1); 78
Germany: Oberlandesgericht Düsseldorf; 6 U 87/96
24 April 1997
Original in German
Published in German: [1997] Forum des Internationalen Rechts 161
Published in English: [1997] 2 The International Legal Forum [English Language Edition] 160
Commented on in German: Pasternacki, [1997] Forum des Internationalen Rechts 166
Commented on in English: Pasternacki, [1997] 2 The International Legal Forum [English Language Edition] 165

An Italian manufacturer, plaintiff, sold shoes to a German buyer, defendant, but failed to deliver the agreed quantity. The manufacturer claimed partial payment. The buyer sought set-off with damages arising from the non-performance and, secondly, claimed the right to suspend payment until delivery of the outstanding quantity of shoes.

The court allowed the manufacturer's claim (article 51(1) CISG). It stated that the buyer had no right to declare the contract avoided, a right that was essential to a damage claim. The prerequisite for declaring a contract avoided under article 49(1) of the CISG is either a fundamental breach of contract or non-delivery within the additional period of time fixed. It held that partial delivery did not lead to a fundamental breach of contract (article 49(1)(a) CISG). Non-delivery on the agreed date of performance will amount to a fundamental breach of contract only if the buyer has a special interest in delivery on time by which the seller can foresee that the buyer would prefer non-delivery instead of late performance (for example, in the case of seasonal merchandise) (article 25 CISG). The court also held that the buyer's telephone call, a reminder demanding prompt delivery, did not fix a

specific time allowing for performance, and as such, did not fulfill the requirements of article 47(1) of the CISG. As the buyer failed to prove that it had fixed an additional period of time for delivery, it could not declare the contract avoided under article 49(1)(b) of the CISG.

Since the seller had made partial performance, partial payment was due under the first clause of article 58(1) of the CISG. Therefore, the buyer was not entitled to suspend partial payment with regard to the outstanding delivery under the second clause of article 58(1) or article 71(1) of the CISG. The seller was entitled to interest according to article 78 of the CISG, and, using the rules of private international law, the court applied Italian law to determine the rate of interest.

Case 276: CISG 9(2)
Germany: Oberlandesgericht Frankfurt am Main; 9 U 81/94
5 July 1995
Original in German
Published in German: http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/ text/258.htm
Abstract published in Italian: [1997] Diritto del Commercio Internazionale 742
Commented on in Spanish: Perales, [1997] Contratos y Empresas

A French producer of chocolates, plaintiff, and a German buyer, defendant, negotiated over the delivery of chocolate. The seller sent a letter of confirmation to which the buyer failed to reply. After delivery, the seller sued for the outstanding purchase price, arguing that a contract had been concluded because the buyer had failed to reject the letter of confirmation. When the court of first instance dismissed the claim, the seller appealed.

The court held that no contract had been concluded by means of a letter of confirmation followed by silence. Although there is an established trade usage which recognizes such a conclusion of contract by silence in the jurisdiction of the recipient's place of business, due to the international character of the CISG, regard is to be given only to trade usages that are known to the law both in the jurisdiction of the offeror and in the jurisdiction of the recipient (article 9(2) CISG). Moreover, the legal effects of the trade usage have to be known to both parties.

Despite that ruling, the court allowed the seller's appeal. It found that a contract already had been concluded between the parties prior to the letter of confirmation.

Case 277: CISG 7(1); 25; 47(1); 49(1)(a); 49(1)(b); 79(1)
Germany: Oberlandesgericht Hamburg; 1 U 167/95
28 February 1997
Original in German
Published in German: [1997] Oberlandesgerichts-Rechtsprechungsreport Hamburg 149; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/261.htm
Abstract in German: [1997] Entscheidungen zum Wirtschaftsrecht 791
Commented on in German: Mankowski, [1997] Entscheidungen zum Wirtschaftsrecht 791
Commented on in English: Koch, [1998] Pace Review of Convention on Contracts for International Sale of Goods 236 No. 203; 259 No. 269

An English buyer, plaintiff, and a German seller, defendant, entered into a contract for the supply of iron-molybdenum from China, CIF Rotterdam, delivery in October 1994. The goods were never delivered to the buyer, as the seller did not itself receive delivery of the goods from its own Chinese supplier. After expiry of an additional period of time for delivery, the buyer concluded a substitute transaction with a third party and sued the seller for the difference between the price paid and the price under the contract.

The court held that the buyer was entitled to damages under article 75 of the CISG. It found that the contract had been avoided under article 49(1) of the CISG, both under paragraphs (a) and (b). As to paragraph (a), it said that, although delay in time is not generally considered as a fundamental breach of contract, it can constitute a fundamental breach if delivery within a specific time is of special interest to the buyer, which must be foreseeable at the time of the conclusion of the contract (article 25 CISG). The incoterm "CIF" by definition determines the contract to be a transaction for delivery by a fixed date. As to paragraph (b), it found that the buyer had fixed an additional period of time for delivery (article 47(1) CISG) within which the seller had failed to deliver.

The court held that an explicit declaration of avoidance was unnecessary once the seller refused to perform its delivery obligation and that to insist on such a declaration would be contrary to the principle of good faith (article 7(1) CISG). Such a declaration is dispensable as long as the avoidance of the contract is possible in principle and it is certain that the seller will not perform its obligations at the time the substitute purchase is made. The court held that a substitute purchase within two weeks after the failure of performance was made in reasonable time.

The court held that the seller was not exempt from liability, neither under a force majeure clause of the contract, nor under article 79(1) of the Convention. The seller bears the risk of itself receiving delivery of the goods from its own supplier. Only if goods of an equal or similar quality were no longer available on the market would the seller be exempted from liability. Furthermore, the court held that it was incumbent upon the seller to bear the risk of increasing market prices at the time of the substitute transaction. Although the market price had risen to an amount triple the price that had been agreed at the time of the conclusion of the original contract, this did not amount to a sacrificial sale price, as the transaction was said to be highly speculative.

Case 278: CISG 6
Germany: Oberlandesgericht Hamm; 11 U 180/97
6 May 1998
Original in German
Published in German: [1999] Neue Juristische Wochenschrift-Rechtsprechungsreport 364; [1999] Transportrecht-Internationales Handelsrecht, 40

During litigation concerning claims arising from an international contract of sale, the parties agreed to exclude application of the CISG.

The court held that parties to an international contract of sale may exclude application of the CISG by agreement and that such an agreement may be reached after conclusion of the contract, for example, during litigation. It also said that the CISG is clearly excluded when the parties agree on the law of a non-Contracting State (article 6 CISG).

Case 279: CISG 1(1)(b); 4; 4(a); 8(1); 8(2); 9(2); 39(2); 53
Germany: Oberlandesgericht Hamburg; 12 U 62/97
5 October 1998
Original in German
Published in German: [1999] Transportrecht-Internationales Handelsrecht, 37

A Chinese manufacturer of circuit boards, plaintiff, delivered an instalment of goods under an exclusive sales agreement to a German buyer, defendant. The buyer made a fraudulent statement to the manufacturer that the goods were essentially worthless and could not be sold. However, when the buyer did sell the goods for approximately three-fifths their stated price, the manufacturer sued for payment of the purchase price. The buyer argued that the claim was made outside of the limitation period and claimed set-off. The buyer also relied on a purported agreement between the parties to lower the price of these goods to zero.

The court found that as the parties had agreed "on the law as per European common market (EU)", this clearly excluded Chinese law. Since there is no uniform contract law within the European Union, the court held that what the parties had intended by this clause was that the law of the most closely related European State would govern the contract. As the parties therefore had made an implied choice of German law, the CISG was applicable (article 1(1)(b) CISG).

The court allowed the manufacturer's claim (article 53 CISG). With the exception of the time limit in article 39(2) CISG, which was not applicable, the CISG does not provide limitation periods (article 4 CISG). Therefore, the court applied German domestic law, pursuant to which limitation was not a ground for exclusion of the claim.

Furthermore, the court held that the set-off claim was not admissible since the parties had agreed upon a contractual payment clause "net 40 days". This clause had to be construed by primarily having regard to the intent of the parties (article 8(1) CISG). As their intent could not be determined, when taking into account objective and international standards of interpretation, such a clause had to be understood as a reference to a trade usage that excludes set-off (articles 8(2) and 9(2) CISG). As authority for determining the international standard of interpretation of this contractual clause, the court cited both German and English case law and authorities. The court rejected the

buyer's view that such a contractual exclusion violated the principle of good faith. Although that principle is relevant in general in the application of the CISG, the circumstances of this case gave no reason to rely on this principle in favour of the defendant.

As to the purported agreement to lower the price to zero, the court held that, even if there had been such an agreement in the manner alleged by the buyer, it would have been annulled by the manufacturer. Since the CISG does not deal with the issue of annulment (article 4(a) CISG), the court applied German domestic law, pursuant to which the agreement would have been annulled by means of a declaration by the seller.

Case 280: CISG 1; [4]; 38(1); 39(1)
Germany: Oberlandesgericht Jena; 8 U 1667/97 (266)
26 May 1998
Original in German
Published in German: [1999] Oberlandesgerichts-Rechtsprechungsreport Jena 4

A Czech seller, plaintiff, claimed payment for living fish delivered to a German buyer, defendant. The buyer refused payment, arguing that the fish were infected with a virus. The buyer also claimed damages by way of set-off, as its own fish stock had been fatally infected by the transmitted virus.

The court found that the buyer had failed to examine the fish in time (article 38(1) CISG). The buyer argued that, as the virus was a latent defect, late examination did not adversely affect its rights. But the court held that the buyer must examine the goods or cause them to be examined within as short a period of time as is practicable under the circumstances, even in the case of a latent defect. The omission of an examination would be irrelevant only if the defect could only have been determined by an expert, which the buyer had failed to prove. The court found that, in the given circumstances, immediate inspection would have been appropriate and examination of random samples of fish would have been sufficient. Moreover, the court held that the buyer was not entitled to rely on the certificate of inspection that had been issued by a veterinarian in order to permit importation of the fish. It also held that the buyer's notice to the seller, given four weeks after discovery of the virus, was too late; notification within eight days would have been appropriate (article 39(1) CISG). Accordingly, the seller's claim was allowed.

As to the buyer's set-off claim, the court held that lack of sufficient notice within the scope of the CISG also extends to exclude a claim for tortious liability [article 4 CISG].

Case 281: CISG 1(1); 1(1)(b); [4]; 35; 39; 57(1)(a)
Germany: Oberlandesgericht Koblenz; 2 U 1230/91
17 September 1993
Original in German
Published in German: [1993] Recht der Internationalen Wirtschaft 934; [1993] Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts No. 35; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/91.htm
Abstract in English: [1995] 15 Journal of Law and Commerce 234
Abstract in Italian: [1998] Diritto del Commercio Internazionale 451
Commented on in English: Cura, [1995] 15 Journal of Law and Commerce 183; Ferrari, [1995] 15 Journal of Law and Commerce 64 and 86; Karollus, [1995] Cornell Review of the CISG 56 and 73; Koneru, [1997] 6 Minnesota Journal of Global Trade 136
Commented on in French: Witz, [1995] Les premières applications jurisprudentielles du droit uniforme de la vente internationale 46

A French seller, plaintiff, and a German buyer, defendant, entered into a long-term contract which granted the buyer exclusive distribution rights in Germany for the seller's computer printers and computer chip. After the contractual relationship had been terminated, the seller sued for outstanding payments of invoices from 1988. The buyer disputed the applicability of the CISG and claimed a set-off. Alternatively, the buyer sought to pay damages in German currency.

The court held that the rules of private international law of Germany led to the application of French law. Since the CISG was in force in France as of 1 January 1988, even though Germany was not a Contracting State at that time, the CISG was held to be applicable (article 1(1)(b)). The court held that the CISG applied to the sale of the computer chip, since, within the meaning of the Convention, "goods" includes all tangibles and intangibles that might be the subject of an international sales contract, which would include computer software (article 1(1) CISG).

The court allowed the seller's claim. It held that the buyer had not alleged any lack of conformity of the goods (article 35 CISG), notwithstanding that any such notice would not have been given to the seller in time (article 39). The claim was awarded in French Francs. Permission to make payment in German currency pursuant to the German Civil Code was not granted, as this was dependent upon the place of performance of the contract being in Germany. According to article 57(1)(a) of the CISG, the seller's place of business in France was the proper place of performance. The court also awarded interest under article 74 of the CISG and stated that the rate of interest was to be determined by the law otherwise applicable, which in this case was French law. This damage award of interest was a legal consequence of the buyer's non-performance (article 61(1)(b) CISG).

As the Convention does not address the matter of set-off, the court applied French law under its rules of private international law and found that the set-off claim was inadmissible.

Case 282: CISG 25; 35(1); 39(1); 48(1); 49(2)(b)(i); 50; 53; 78; 80
Germany: Oberlandesgericht Koblenz; 2 U 31/96
31 January 1997
Original in German
Published in German: [1997] Oberlandesgerichts-Rechtsprechungsreport Koblenz 37;
http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/256.htm

A Dutch seller, plaintiff, delivered acrylic blankets to a German buyer, defendant. The buyer gave notification of the lack of quality of the goods and claimed that five reels of blankets were missing. The buyer also argued that the sale was conditional upon an exclusive distributorship agreement between the parties, which had been violated by the seller. The seller brought an action for the outstanding purchase price and the buyer claimed set-off.

The court held that the seller's claim was justified (article 53 CISG). Lack of conformity includes lack of both quality and quantity (article 35(1) CISG), but the buyer had lost its right to rely on the lack of conformity under the Convention. Although the buyer gave notice that five reels of blankets were missing, it did not specify of which design. As the seller had delivered blankets in different designs, the notice did not enable the seller to remedy the non-conformity. Therefore, the notification was said to lack sufficient specification (article 39(1) CISG).

As to the sale being conditional upon compliance with an exclusive distributorship agreement, the court stated that, if any such condition existed, which the buyer had failed to prove, the buyer had lost its right to declare the contract avoided as it failed to do so within a reasonable time (article 49(2)(b)(i) CISG). The period of time considered reasonable must be determined in the light of the seller's interest in certainty and whether the seller has to arrange for alternative use of the goods. Even taking into account the time required for consideration, to obtain legal advice, and for negotiations between the parties, eight weeks was held to be unreasonable. These considerations also would apply to the time period within which the buyer could declare the contract avoided due to the lack of conformity of the goods.

Moreover, since the seller had made an offer to deliver new goods, which was refused by the buyer, the lack of quality did not amount to a fundamental breach of contract (article 25 CISG). In considering a breach to be fundamental, account has to be taken not only of the gravity of the defect, but also of the willingness of the party in breach to provide substitute goods without causing unreasonable inconvenience to the other party (article 48(1) CISG). Thus, in the given case, even a serious lack of quality was said not to constitute a fundamental breach as the seller had offered to furnish additional blankets (article 49(1) CISG). Therefore, the buyer was not entitled to damages as it had rejected the seller's offer for new delivery without justification (article 80 CISG). It thereby also lost its right to reduce the price (article 50 (second clause) CISG). The seller was entitled to interest (article 78 CISG), determined according to Dutch law.

The decision is under appeal to the Supreme Court.

Case 283: CISG 1(1); 58(1); 61(1); 62; 67(1)
Germany: Oberlandesgericht Köln; 2 U 175/95
9 July 1997
Original in German
Unpublished

A Spanish seller, defendent, concluded a dealer agreement with a German buyer, a company in which the plaintiff was a shareholder. As part of its security for payment, the seller held a mortage on land owned by the plaintiff. According to the agreement, the seller was obliged to deliver goods at "list price ex works". The buyer denied having received one of the shipments that was to have been made under the agreement, which consisted of some hundred video cameras and equipment, and refused payment. The matter came before the court as an action to oppose the seller's foreclosure of this mortgage.

Noting that the parties had agreed that German law would govern, the court held that the CISG was applicable, even though the parties had concluded the dealer agreement in 1988 and the CISG only became part of German law in 1991. The court found that the material time for the determination of the law applicable to the purchase money claim was not the conclusion of the dealer agreement, but rather, the moment of the purchase order in 1992. A choice of law clause in a contract, which governs future trading relations between two parties, must be construed in such a way so as to refer to the national law at the time of the conclusion of the contract and to all relevant changes in the law during the period of time that is governed by the contract. The court described this as a "dynamic reference" to a national law, as opposed to a "static reference" (article 1(1) CISG).

The court stated that, unless the parties had agreed upon another time, the seller can require the buyer to pay the price only after the goods or the documents controlling disposition of the goods are placed at the buyer's disposal (articles 58(1) and 62 CISG). According to the seller's interpretation, "list price ex works" meant that delivery and the passage of risk took place in Japan, at the production factory of the goods. According to the buyer, the terms were to be interpreted as referring only to the price and not to passage of risk. The court found that there was no inconsistency between the terms and the provisions of article 67(1) of the CISG, according to which the risk passes to the buyer when the goods are handed over to the first carrier. It found that the seller had been unable to discharge its burden of proof that delivery to the first carrier had been made. A bill of lading which indicated that a container said to contain the specified brand name and number of goods had been delivered to a freight forwarder, but which did not indicate the name of the buyer as recipient, was not sufficient proof of delivery (article 67(1) CISG).

The court held that, as the seller had no right to claim payment of the purchase price under article 61(1) of the CISG, it had no right to foreclose on the mortgage against the land.

Case 284: CISG 35; 38(1); 39(1); 77; 81(1)
Germany: Oberlandesgericht Köln; 18 U 121/97
21 August 1997
Original in German
Published in German: [1998] Oberlandesgerichts-Rechtsprechungsreport Köln 2; [1998] Versicherungsrecht 1513; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/290.htm
Commented on in French: Witz, [1998] Recueil Dalloz, 34ème Cahier, Sommaires Commentés 311

A German seller, plaintiff, made several deliveries of aluminium hydroxide to a French glass manufacturer, defendant. The buyer stored the chemicals in a silo, adding new material to that from previous deliveries. Due to the lack of quality of the aluminium hydroxide, the glass produced was defective. On the day after the second of the two deliveries in question, the buyer notified the seller that the goods received in two previous deliveries had been defective. The seller contested the lack of quality of the goods in the said deliveries and sued for the purchase price. The court of first instance allowed the claim.

The court dismissed the buyer's appeal. It held that the buyer was not released from its obligations under article 81(1) of the CISG, since the buyer was not entitled to declare the contract avoided. As to the first delivery in question, the court held that the buyer had failed to prove that the unusable aluminium hydroxide derived from this particular delivery. During the relevant time period, several deliveries had been made by the seller. Although the silo only contained chemicals delivered by the seller, if the defect had arisen from a different delivery, the buyer would have failed to notify the seller (article 39(1) CISG). As to the second delivery in question, the court found that, as defective glass already had been produced prior to the date of this delivery, the buyer had failed to prove any lack of quality of this particular delivery (article 35 CISG).

Moreover, the court held that the buyer had failed to examine the goods in time. Under normal circumstances, examination within a period of one month would have been reasonable. However, where delivered goods are mixed with previous deliveries, immediate inspection was said to be incumbent, since the defect would have been revealed even by means of simple tests (article 38(1) CISG).

The court held that, by mixing the aluminium hydroxide without prior examination, the buyer had failed to take due care of its own goods; consequently, it also failed to mitigate its loss (article 77 CISG). Thus, the buyer was not entitled to set-off with damages.

Case 285: CISG 38(1); 39(1); 40; 44
Germany: Oberlandesgericht Koblenz; 2 U 580/96
11 September 1998
Original in German
Published in German: [1999] Oberlandesgerichts-Rechtsprechungsreport Koblenz 49

A Moroccan buyer, plaintiff, purchased raw material for manufacturing plastic PVC tubes (dryblend) from a German seller, defendant. When the buyer discovered that the dryblend was not suitable for use in its manufacturing facilities, the buyer claimed lack of quality and sued for damages.

The court dismissed the claim. It held that the buyer had lost its right to rely on the lack of conformity according to article 39(1) of the CISG. Giving notice to the seller three weeks after delivery was held as being too late. The court said that, if trial processing was necessary to examine the quality of the goods, a period of one week for examination and another week for giving notice would have been reasonable. As to the buyer's argument that it had been unable to examine the goods any earlier because the manufacturing facilities were still under construction, the court held that this did not constitute a reasonable excuse (article 44 CISG). Such an excuse demanded that the buyer acted with reasonable care in providing for prompt examination of the goods, which included the timely supply of machinery necessary for trial processing. The buyer failed to provide particulars that it had acted with such due care. Moreover, disorganisation on the part of the buyer was not an aspect to be considered in determining the period practicable in the circumstances (article 38(1) CISG).

Since the seller was found not to have been aware of the fact that the dryblend was not suitable for producing plastic tubes in the buyer's manufacturing facilities, as the buyer had failed to inform the seller of the kind of equipment in use, the seller did not lose its right to rely on late notification (article 40 CISG). The court said that, although there would be a loss of the right to rely on late notification if the seller had had a duty to warn the buyer or provide additional information about the goods delivered, in this case there had been no such obligation.

Case 286: CISG 1(1); 3(1); 31(a); 31(b); 57(1)(a)
Germany: Oberlandesgericht München; 23 U 3750/95
22 September 1995
Original in German
Published in German: [1996] Recht der Internationalen Wirtschaft 1035; [1995] Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts Nr.152, 307
Commented on in German: Klima, [1996] Recht der Internationalen Wirtschaft 1036

A German manufacturer of fork lifts, plaintiff, brought an action for a declaratory judgment that the French buyer, defendant, had no right to distribute the manufacturer's fork lifts in France. The buyer argued that it had the right to do so according to an exclusive distribution contract between the parties. The court of first instance allowed the manufacturer's claim. On appeal, the buyer objected to the jurisdiction of the German court.

The appellate court held that it had jurisdiction. Under article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is based on the place of performance of the contract and, in this case, the place of performance was the manufacturer's place of business in Germany (articles 31(a), 31(b) and 57(1) CISG).

The court found that the CISG was applicable even though, in general, the CISG applies to contracts of sale and not to agency contracts. In this case, although the dispute was not over a contract of sale, the question for determination was whether the manufacturer was obliged to deliver the goods to the buyer. Such an obligation does not only provide the other party with the right to distribute the goods, it also includes the general obligation by the manufacturer to supply the goods to the other party under certain conditions. This general obligation to supply goods constitutes the basis for future contracts of sale. Therefore, the question of whether or not such an obligation exists must

be answered according to the Convention (article 1(1) CISG). As the buyer had failed to provide particulars as to the alleged exclusivity arrangement, the manufacturer's claim was allowed.

Case 287: CISG 1(1)(a); 3(2); 57(1)(a); 57(1)(b)
Germany: Oberlandesgericht München; 7 U 2246/97
9 July 1997
Original in German
Published in German: [1997] Der Betriebsberater 2295; [1998] Oberlandesgerichts-Rechtsprechungsreport München 22

A German seller, plaintiff, and a French buyer, defendant, concluded a dealer agreement according to which the buyer was to act as the seller's appointed dealer in the sale of fitness equipment. Pursuant to that agreement, the buyer made several equipment purchases. When the seller sued for unpaid purchases, the buyer objected to the jurisdiction of the German court.

The appellate court confirmed the ruling of the court of first instance that, under article 5(1) of the European Communities Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, jurisdiction is based on the place of performance of the contract. Since both Germany and France were Contracting States to the CISG, and since the parties had agreed on the application of German law, the CISG was applicable to determine the place of performance. The court found that the parties had not agreed upon a place of payment other than at the seller's place of business (article 57(1)(a) CISG) and had not agreed on payment to be made against the handing over of goods or documents (article 57(1)(b) CISG). Neither the contractual clause requiring payment to be made by irrevocable letter of credit nor the contractual provisions altering the passing of risk had changed the place of performance. As this was the place where the seller had its business in Germany, the court held that it had jurisdiction.

The court found that the dealer agreement provided that the seller "sells" goods to the buyer; any subsequent contract entered into thereunder for the purchase of equipment was a contract of sale to which the Convention applied (article 1(1)(a) CISG). Although the buyer acted as an intermediary, application of the Convention was not excluded by article 3(2) of the CISG.

Case 288: CISG 4; 53; 74; 81(2)
Germany: Oberlandesgericht München; 7 U 3771/97
28 January 1998
Original in German
Published in German: [1998] Recht der Internationalen Wirtschaft 559

An Italian seller, plaintiff, sued a German car dealer, defendant, for the outstanding purchase price of a car under the first contract and restitution of money paid without obligation under a second contract for the purchase of additional cars. The buyer had paid for the first contract with a cheque, which was dishonoured. When the second contract was cancelled by the parties, the seller made a cash reimbursement of the advance payment that had been made by the buyer with another cheque, which later was also dishonoured. The buyer claimed set-off.

The court allowed the seller's claim under the first contract and held that the buyer was obliged to pay for the car (article 53 CISG). The award included damages for the costs of the dishonoured cheque (article 74 CISG).

Concerning the claim for restitution, the court stated that it was not governed by the CISG (article 4 CISG). It held that a claim for restitution is governed by the CISG only if payment is made under the original contract (article 81(2) CISG). If, after cancellation of a contract the seller redeems the purchase price which the seller, in fact, has never received, this cannot be considered as payment made under the contract. The seller performed a non-existing obligation with no connection to a contract of sale. However, the court held that, under the rules of German private international law, Italian law was applicable to justify the claim for restitution.

Similarly, as the CISG does not deal with set-off (article 4 CISG), the court held that, under the rules of German private international law, Italian law was applicable such that the claim for set-off was inadmissible.

Case 289: CISG [4]; 39(1); 53
Germany: Oberlandesgericht Stuttgart; 5 U 195/94
21 August 1995
Original in German
Published in German: [1996] Praxis des Internationalen Privat- und Verfahrensrechts 139; [1995] Recht der Internationalen Wirtschaft 934; [1995] 42 Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts 78; http://www.jura.uni-freiburg.de/ipr1/cisg/urteile/text/150.htm
Commented on in German: Kronke, [1996] Praxis des Internationalen Privat- und Verfahrensrechts 139

An Italian seller, plaintiff, claimed payment for a machine delivered to a German buyer, defendant, under a contract of sale. The buyer argued that the machine was defective and refused to pay the full purchase price.

The court allowed the seller's claim. It held that the buyer had not given notice of the lack of conformity to the seller within a reasonable time. Taking into account different national legal traditions, "within a reasonable time" would have meant about one month. Moreover, the buyer had not given notice that sufficiently specified the lack of conformity (article 39(1) CISG). The court held that the buyer had failed to give notice of the lack of conformity as required by the Convention and was therefore obliged to pay the purchase price (article 53). Furthermore, the court said that the matter of set-off is not covered by the CISG.

Case 290: CISG 38; 39; 53
Germany: Oberlandesgericht Saarbrücken; 1 U 703/97-143
3 June 1998
Original in German
Published in German: [1998] Oberlandesgerichts-Rechtsprechungsreport Saarbrücken 398;
[1999] Neue Juristische Wochenschrift-Rechtsprechungsreport 780;
[1999] Transportrecht-Internationales Handelsrecht 41

A German buyer, defendant, purchased flowers from an Italian seller, plaintiff. Upon collecting the flowers at the site of the seller's business, the buyer's driver commented upon their "miserable" state. After receiving the goods, the buyer informed the seller of the "miserable" state of the flowers and refused to pay the purchase price.

The court found that the buyer had not complied with the obligation to specify the lack of conformity; the notice given to the seller did not contain an exact description of the non-conformity and could have referred to the size and appearance of the flowers rather than their inferior condition. The court also stated that, where international trade in flowers is involved, the buyer can be expected to act immediately on the day of the delivery (articles 38 and 39 CISG). As the buyer had lost its right to rely on the lack of conformity, the buyer was obliged to pay the purchase price (article 53 CISG).

II. ADDITIONAL INFORMATION

Addenda/Corrigendum

Document A/CN.9/SER.C/ABSTRACTS/22

(Arabic, Chinese, English, French, Russian, Spanish)

Case 238

Published in German: [1999] Zeitschrift für Rechtsvergleichung 65
The reference to the publication in the caption *should read* "Abstract published in German: [1998] Zeitschrift für Rechtsvergleichung 158"

Case 240

Published in German: [1990] Zeitschrift für Rechtsvergleichung 63

Corrigenda

Document A/CN.9/SER.C/ABSTRACTS/24

(Spanish Text Only)

The reference in the statement as to copyright *should read* "Secretary, United Nations Publications Board, United Nations Headquarters"

Case 247

First paragraph: delete "'C.F.R.' y 'F.O.'."

Unreported cases on the CISG

NOTE: The following compilation of unreported cases has been prepared by the Secretariat based on information that was available as of November 1, 1999. The list incorporates information from the list that had previously been published in A/CN.9/SER.C/ABSTRACTS/8 and consequently replaces that list in its entirety. Cases are listed by jurisdiction, the order of citation being the name of the court, the date of the decision, the decision court number, followed by a single reference to the published decision, if one is known to the secretariat, and, for those jurisdictions where this is provided, the party names are also included. References to websites on the internet have not been included.[1] For a list of CISG cases with references to the journals in which they were published and the CISG article which they are applying, see Michael R. Will, International Sales Law under the CISG, The First 555 or so decisions, Geneva 1999.

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[1] Abstracts or full texts of some of the unreported cases that have been listed may be found at the following websites on the internet.
http://www.cisg.law.pace.edu/network.html http://www.cisg.law.pace.edu/cisg/search_cases.html
http://www.jura.uni-freiburg.de/cgi-bin/urteile/public/urtstart.idc
http://www.jura.uni-sb.de/FB/LS/Witz/cisginh.htm
http://www.uc3m.es/uc3m/dpto/PR/dppr03/cisg/index.html
http://soi.cnr.it/~crdcs/crdcs/case_law.htm
http://cisgw3.law.pace.edu/galindo-da-fonseca/brasil-uff/construcao.html
http://www.utu.fi/oik/tdk/cisg/cisg.htm
http://www.law.kyushu-u.ac.jp/~sono/cisg/english.htm
http://www.biu.ac.il/law/cisg

A. Cases on which no abstracts will be prepared[2]

1. Australia

Court of Appeal, New South Wales, 12.03.1992, N.S.W. Law Rep. 1992, 234, Renard v. Minister.

2. Mexico

Comisión para la Proteción del Comercio Exterior de Mexico, 04.05.1993, M/66/92, Diario Oficial 27.05.1993, 17.

3. Switzerland

Tribunal Cantonal Vaud, 29.04.1992, SZIER 1993, 664;
Handelsgericht Zürich, 09.04.1991, SZIER 1993, 644.

4. U.S.A.

U.S. Court of International Trade, 24.10.1989, 726 F.Supp. 1344, Orbisphere v. U.S.;
U.S. District Court, Southern District of New York, 06.04.1994, 1994 U.S. Dist. Lexis 4114, Braun v. Alitalia.

5. Arbitral Awards

Iran-U.S. Claims Tribunal, 28.07.1989, Yb. Comm. Arb. 1990, 220, Watkins-Johnson v. Iran.

B. Cases that have been appealed[3]

1. Argentina

Juzgado Nacional de Primera Instancia en Lo Comercial (JNPILC) no. 18 de Buenos Aires, 20.10.1989, Quilmes Combustibles, SA c. Vig SA (No. 22);
JNPILC no. 11 de Buenos Aires, 18.03.1994, Bedial, SA c. Paul Müggenburg GmbH (No. 191).

2. Austria

Oberlandesgericht Wien, 07.11.1996, 2 R 107/96m-29 (No. 189);
Landesgericht (LG) Feldkirch, 29.03.1994, 5 Cg 176/92y-64 (No. 107);
LG Graz, 04.03.1993 (No. 106).

2/ These are cases which, in the view of the National Correspondents, are not relevant to the interpretation or application of an UNCITRAL text. They are listed, however, with a reference to the journal in which they appear, so that CLOUT-users may have a chance to read them, if they so wish.

3/ Where there has been an appeal, the preparation of an abstract for CLOUT of the decision by the lower court will not be considered a priority.

3. Germany

Oberlandesgericht (OLG) Düsseldorf, 18.11.1993, 6 U 228/92 (No. 124);
OLG Düsseldorf, 13.09.1996, 17 U 18/96 (No. 235);
OLG Frankfurt/M., 15.03.1996, 25 U 100/95 (BGH, 23.07.1997, VIII ZR 130/96, infra);
OLG Frankfurt/M., 15.03.1996, 25 U 187/95 (BGH, 23.07.1997, VIII ZR 134/96, infra);
OLG Hamburg, 14.12.1994, 5 U 224/93 (No. 171);
OLG Nürnberg, 20.09.1995, 12 U 2919/94 (No. 229);
OLG Schleswig, 27.04.1995, 11 U 191/93 (No. 268);
Landgericht (LG) Aachen, 19.04.1996, 43 O 70/95 (OLG Köln, 08.01.1997, 27 U 58/96, infra);
LG Arnsberg, 12.10.1994, 2 O 217/94 (No. 125);
LG Augsburg, 12.07.1994, 2 HK O 5024/93 (OLG München, 06.07.1995, 27 U 798/94, infra);
LG Baden-Baden, 13.01.1992, 4 O 63/91 (OLG Karlsruhe, 20.11.1992, 15 U 29/92, infra);
LG Berlin, 06.10.1992, 103 O 70/92 (No. 80);
LG Bielefeld, 18.01.1991, 15 O 201/90 (No. 227);
LG Darmstadt, 22.12.1992, 14 O 165/92 (No. 123);
LG Dortmund, 15.10.1992, 16 O 66/91 (OLG Hamm, 27.01.1995, 11 U 19/93, infra);
LG Dortmund, 14.07.1993, 10 O 167/92 (No. 132);
LG Düsseldorf, 09.07.1992, 31 O 223/91 (No. 124);
LG Düsseldorf, 04.12.1992, 40 O 91/91 (No. 81);
LG Düsseldorf, 22.03.1993, 37 O 169/92 (No. 82);
LG Düsseldorf, 05.03.1996, 36 O 178/95 (No. 275);
LG Frankfurt/M., 09.12.1992, 3/3 O 37/92 (No. 79);
LG Frankfurt/M., 02.05.1990, 3/13 O 125/89 (No. 2);
LG Frankfurt/M., 06.07.1994, 2/1 O 7/94, Unilex (No. 276);
LG Frankfurt/M., 13.07.1994, 3/13 O 3/94 (OLG Frankfurt/M., 23.05.1995, 5 U 209/94, infra);
LG Gießen, 22.12.1992, 6 O 66/92 (No. 121);
LG Hamburg, 05.11.1993, 404 O 175/92 (No. 171);
LG Hamburg, 23.10.1995, 419 O 85/95 (No. 277);
LG Heidelberg, 02.10.1996, O 37/96 KfH II (No. 230);
LG Kassel, 14.07.1994, 11 O 4279/93 (No. 135);
LG Kassel, 02.05.1995, 12 O 4366/94 (BGH 23.07.1997, VIII ZR 130/96, infra);
LG Koblenz, 29.11.1995, 3 HO 188/94 (No. 282, BGH still pending);
LG Köln, 14.02.1992, 90 O 288/90 (OLG Köln, 16.10.1992, 19 U 118/92, infra);
LG Köln, 11.11.1993, 86 O 119/93 (No. 122);
LG Köln, 16.11.1995, 5 O 189/94 (No. 168);
LG Krefeld, 18.03.1992, 11 O 159/91 (No. 48);
LG Krefeld, 28.04.1993, 11 O 210/92, (No. 130);
LG Krefeld, 19.12.1995, 12 O 160/93 (No. 235);
LG Lübeck, 17.08.1993, 8 O 200/91 (No. 268);
LG Lüneburg, 01.07.1994, 8 O 415/93 (No. 136);
LG Mönchengladbach, 22.05.1992, 7 O 80/91 (OLG Düsseldorf, 12.03.1993, 17 U 136/92, infra);
LG München I, 24.05.1993, 15 HKO 19978/91 (No. 83);
LG München I, 08.11.1993, 15 HKO 12117/93 (No. 133);
LG München I, 07.03.1994, 14 HKO 23317/93 (No. 167);
LG München I, 02.08.1994, 13 HKO 17330/93 (No. 134);
LG München I, 09.12.1996, 14 HKO 3315/96 (No. 287);
LG München I, 06.05.1997, 16 HKO 24030/96 (No. 288);

LG München I, 23.06.1997, 11 HKO 5713/97 (No. 287);
LG Münster, 05.03.1992, 22 O 217/91 (OLG Hamm, 25.11.1992, 11 U 92/92, infra);
LG Nürnberg-Fürth, 26.07.1994, 5 HKO 10824/93 (No. 229);
LG Oldenburg, 06.07.1994, 12 O 3010/93 (No. 165);
LG Saarbrücken, 23.03.1992, 9 O 4084/89, (OLG Saarbrücken, 13.01.1993, 1 U 69/92, infra);
LG Saarbrücken, 18.07.1997, 7 III O 25/96 (No. 290);
LG Schwerin, 30.06.1994, 4 O 160/94 (No. 228);
LG Waldshut-Tiengen, 16.01.1992, 3 HO 34/90 (OLG Karlsruhe, 11.02.1993, 4 U 61/92, infra);
Amtsgericht (AG) Mayen, 06.09.1994, 2 C 1005/92 (LG Koblenz, 07.07.1995, 14 S 358/94, infra);
AG Ludwigsburg, 21.12.1990, 4 C 549/90 (LG Stuttgart, 13.08.1991, 16 S 40/91, infra).

4. Hungary

Fováros Bíróság Budapest, 10.01.1992

5. Netherlands

Gerechtshof (Gh) Arnhem, 12.06.1990, 596/89, NIPR 1991, No. 130 (Hoge Raad (HR), 25.09.1992, 14566, infra);
Gh's-Hertogenbosch, 20.05.1996, 467/94/HE (HR, 20.02.1998, 16442, infra);
Arrondissementsrechtbank (Rb) Almelo, 21.06.1989, NIPR 1989, No. 468 (HR, 25.09.1992, 14566, infra);
Rb Haarlem, 18.02.1992, H 2358/90, NIPR 1993, 461 (Gh Amsterdam, 08.04.1993, 495/92, infra);
Rb's-Hertogenbosch, 04.02.1994, 1369/92 (HR, 20.02.1998, 16442, infra);
Rb Roermond, 27.02.1992, 910110, NIPR 1995, 244 (Gh 's-Hertogenbosch, 14.12.1994, infra);
President Rb Breda, 23.09.1991, KG 350/91, Unilex (Gh 's-Hertogenbosch, 26.02.1992, 856/91/BR, infra);
President Rb Utrecht, 16.04.1992, KG 0.4.21.223-224/92, NIPR 1992, 712, (Gh Amsterdam, 16.07.1992, 550/92 SKG, infra).

C. Cases to be reported on[*]

1. Argentina

Cámara Nacional de Apelaciones en Lo Comercial de Buenos Aires, 14.10.1993, 45626, El Derecho 25.04.1994, 4, Inta, S.A. c. MCS Officina Meccan S.p.A.;
Juzgado Nacional de Primera Instancia en Lo Comercial (JNPILC) no. 10 de Buenos Aires, 23.10.1991, Aguila Refractarios, S.A.;
JNPILC no. 10 de Buenos Aires, 06.10.1994, 56179, Unilex, Bermatex, S.R.L. c. Valentin Ruis Clapers, S.A. c. Sbrojovka Vsetin;

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*/ These cases will appear in a future CLOUT publication either in the abstracts section or in the section of cases on which no abstracts will be prepared.

2 Australia

Federal Court of Australia, South Australian District, Adelaide, 28.04.1995, 1995 Fed. Court Rep. 216 [Australia], Roder Zelt- und Hallenkonstruktionen v. Rosedown Park Pty. Ltd. and Reginald R Eustace.

3. Austria

Oberster Gerichtshof (OGH), 07.06.1990, 7 Ob 590/90, IPrax 1991, 419;
OGH, 28.05.1991, 4 Ob 515, 516/91, JBl 1992, 118; OGH, 28.04.1993, 3 Ob 570/92, JBl 1993, 782;
OGH, 24.11.1993, 3 Ob 549/93, ZRVgl 1994, 121;
OGH, 26.05.1994, 2 Ob 534/94, ZRVgl 1994, 248;
OGH, 24.10.1995, 4 Ob 1652/95, ZRVgl 1996, 76;
OGH, 24.04.1997, 2 Ob 109/97m, ZRVgl 1997, 156;
OGH, 11.09.1997, 6 Ob 187/97, ZRVgl 1997, 245;
OGH, 10.03.1998, 7 Ob 336/97f, ZRVgl 1998, 161;
OGH, 30.06.1998, 1 Ob 273/97x, ZRVgl 1999, 249;
OGH, 02.04.1998, 2 Ob 2138/96t, ZRVgl 1999, 248;
OGH, 25.06.1998, 8 Ob 364/97f, ZRVgl 1998, 207;
OGH, 10.09.1998, 2 Ob 221/98h, JBl 1999, 333;
Bezirksgericht für Handelssachen Wien, 20.02.1992, 9 C 3486/90w, RdW 1992, 239;
Bezirksgericht Leibnitz, 27.10.1992, 4 C 2856/91f.

4. Belgium

Rechtbank van Koophandel (RbK) Hasselt, 24.01.1995, Unilex, Wilvorst GmbH v. NV Erarts;
RbK Hasselt, 01.03.1995, Unilex, J.P.S. BVBA v. Kabri Mode BV;
RbK Hasselt, 02.05.1995, Unilex, Vital Berry Marketing NV v. Dira-Frost NV;
RbK Hasselt, 18.10.1995, Rechtskundig Weekblad 1995-96, 1378;
RbK Hasselt, 08.11.1995, Unilex, SPA Ca'Del Bosco v. Francesco NV;
RbK Hasselt, 09.10.1996, Unilex, Margon S.R.L. v. NV Sadelco;
RbK Hasselt, 21.01.1997, Unilex, Epsilon BVBA v. Interneon Valkenswaard BV;
Tribunal Commercial de Nivelles, 19.09.1995, Unilex, SA Gantry v. Research Consulting Marketing.

5. Canada

Ontario Superior Court of Justice, 31.08.1999, 98-CV-142493CM, La San Giuseppe v. Forti Moulding Ltd.

6. China

Fujian Higher People's Court (HPC), 19.05.1994, Zhongguo shenpan anli aolan (Overview of Chinese judicial cases), 1995, 1261, Sanming v. Zhangzhou Metallic Minerals;
Guandong HPC, *(date unknown)*, Guoting (ed.), Dangdai Zhongguo shewai fingfi jiufenan jingxi (Selected cases with commentary on foreign related disputes in contemporary China), 1995, 76, Zhanjiang Textiles v. Hong Kong Xianda Fashion;
Xiamen Intermediate People's Court (IPC), 31.12.1992, Selected cases (see above), 132, Lianzhong v. Xiamen Trade;

Xiamen IPC, 10.11.1993, Zhongguo shenpan anli aolan (Overview of Chinese judicial cases), 1261, Sanming v. Zhangzhou Metallic Minerals;
Xiamen IPC, 05.09.1994, Selected cases (see above),153, Xiamen Trade v. Lianzhong;
Zhanjiang IPC, 07.03.1994, Selected cases (see above), 76, Zhanjiang Textiles v. Hong Kong Xianda Fashion;
(tribunal unknown), 28.12.1993, China Law and Practice 1994, 18, Hong Kong Trading Company v. China Import-Export Company.

7. Europe

European Court of Justice, 29.06.1994, C-288/92, RIW 1994, 676.

8. France

Cour d'Appel (CA) Colmar, 26.09.1995, Sté. Ceramique Culinaire de France c. Musgrave Ltd.;
CA Paris, 06.04.1995, J.D.I. 1995, 971;
CA Paris, 14.01.1998, SZIER 1999, 201;
CA Paris, 21.05.1999;
CA Versailles, 19.04.1995;
Tribunal de Commerce (TC) Besançon, 09.09.1996;TC Paris, 28.10.1997;
TC Poitiers, 09.12.1996, 509/96, Hundsbichler KG c. Soc. Boyauderie du Poitou.

9. Germany

Bundesgerichtshof (BGH), 26.03.1992, VII ZR 258/91, RIW 1992, 756;
BGH, 23.07.1997, VIII ZR 130/96 ("Benneton I"), NJW 1997, 3304;
BGH, 23.07.1997, VIII ZR 134/96 ("Benneton II"), NJW 1997, 3309;
BGH, 17.12.1997, VIII ZR 231/96, WM 1998, 936;
Oberlandesgericht (OLG) Düsseldorf, 12.03.1993, 17 U 136/92;
OLG Frankfurt/M., 23.05.1995, 5 U 209/94;
OLG Hamburg, 08.03.1996, 14 U 86/95;
OLG Hamm, 25.11.1992, 11 U 92/92, OLG-RR Hamm 1993, 161;
OLG Hamm, 25.01.1993, 8 U 250/91, NJW-RR 1993, 1445;
OLG Hamm, 27.01.1995, 11 U 19/93;
OLG Hamm, 05.11.1997, 11 U 41/97;
OLG Karlsruhe, 20.11.1992, 15 U 29/92, NJW-RR 1993, 1316;
OLG Karlsruhe, 11.02.1993, 4 U 61/92, RIW 1994, 1046;
OLG Koblenz, 23.02.1990, 2 U 1795/89, RIW 1990, 316
OLG Koblenz, 27.09.1991, 2 U 1899/89, Unilex;
OLG Köln, 27.11.1991, 2 U 23/91, IPRspr. 1991 Nr. 48, 85;
OLG Köln, 16.10.1992, 19 U 118/92, RIW 1993, 143;
OLG Köln, 15.05.1996, 27 U 99/95;
OLG Köln, 08.01.1997, 27 U 58/96;
OLG München, 09.08.1995, 7 U 7143/92, IPrax 1997, 38;
OLG München, 28.06.1995, 27 U 798/94;
OLG München, 06.07.1995, 27 U 798/94;
OLG Saarbrücken, 13.01.1993, 1 U 69/92;
OLG Schleswig, 08.04.1992, 1 U 117/89, IPrax 1993, 93;

OLG Stuttgart, 21.08.1995, 5 U 195/94, IPrax 1996, 139;
Landgericht (LG) Aachen, 28.07.1993, 42 O 68/93;
LG Aachen, 20.07.1995, 41 O 111/95, Unilex;
LG Berlin, 16.09.1992, 99 O 29/92, Unilex;
LG Berlin, 30.09.1992, 99 O 123/92, Unilex;
LG Berlin, 15.09.1994, 52 S 247/94;
LG Bochum, 24.01.1996, Unilex;
LG Bielefeld, 23.06.1989, 15 O 12/89, IPrax 1990, 315;
LG Darmstadt, 25.10.1994, 18 O 848/92, IPRspr. 1994, Nr. 144, 327;
LG Duisburg, 17.04.1996, 45 (19) O 80/94, RIW 1996, 774;
LG Düsseldorf, 23.06.1994, 31 O 231/93;
LG Düsseldorf, 25.08.1994, 31 O 27/92, Unilex;
LG Düsseldorf, 11.10.1995, 2 O 506/94;
LG Ellwangen, 21.08.1995, 1 KfH O 32/95;
LG Gießen, 05.07.1994, 6 O 85/93, NJW-RR 1995, 438;
LG Göttingen, 19.11.1992, 3 O 100/92, Unilex;
LG Hagen, 15.10.1997, 22 O 90/97;
LG Hamburg, 17.06.1996, 417 O 165/95, Unilex;
LG Hamburg, 19.06.1997, 302 O 223/95, RIW 1997, 873;
LG Hannover, 01.12.1993, 22 O 107/93, Unilex;
LG Heidelberg, 03.07.1992, O 42/92 KfH I, Unilex;
LG Heidelberg, 03.07.1992, O 42/92 KfH I, Unilex;
LG Hildesheim, 20.07.1990, 11 O 116/89;
LG Kassel, 22.06.1995, 8 O 2391/93, Unilex;
LG Kassel, 21.09.1995, 11 O 4261/94;
LG Kassel, 15.02.1996, 11 O 4185/95, NJW-RR 1996, 1146;
LG Kassel, 15.02.1996, 11 O 4187/95;
LG Köln, 09.10.1996, 91 O 130/94, RIW 1997, 956;
LG Koblenz, 07.07.1995, 14 S 358/94, JbItR 1997, 190;
LG Krefeld, 24.11.1992, 12 O 153/92, Unilex;
LG Landshut, 05.04.1995, 54 O 644/94, Unilex;
LG Marburg, 12.12.1995, 2 O 246/95, RIW 1996, 328;
LG Memmingen, 01.12.1993, 2 HO 1434/92, IPrax 1995, 251;
LG München I, 20.03.1995, 10 HKO 23750/94, IPrax 1996, 31;
LG München I, 29.05.1995, 21 O 23363/94, IPrax 1996, 266;
LG München I, 25.01.1996, 12 HKO 2648/95;
LG Oldenburg, 27.04.1994, 12 O 3725/93, juris;
LG Oldenburg, 09.11.1994, 12 O 674/93, NJW-RR 1994, 1075;
LG Oldenburg, 15.02.1995, 12 O 2028/93, Unilex;
LG Oldenburg, 28.02.1996, 12 O 2943/94;
LG Oldenburg, 27.03.1996, 12 O 2541/95;
LG Paderborn, 25.06.1996, 7 O 147/94, Unilex;
LG Saarbrücken, 26.03.1996, 7 IV O 75/95;
LG Siegen, 05.12.1995, 6 O 135/94, Unilex;
LG Stuttgart, 13.08.1991, 16 S 40/91, Unilex;
LG Verden, 08.02.1993, 9 O 85/92, Unilex;
Amtsgericht (AG) Alsfeld, 12.05.1995, 31 C 534/94, NJW-RR 1996, 20;
AG Augsburg, 29.01.1996, 11 C 4004/95, Unilex;

AG Bayreuth, 02.05.1995, 8 C 348/95;
AG Berlin-Charlottenburg, 04.05.1994, 7b C 34/94;
AG Berlin-Tiergarten, 13.03.1997, 2 C 22/97, IPrax 1999, 159;
AG Cloppenburg, 14.04.1993, 2 C 425/92, Unilex;
AG Kehl, 06.10.1995, 3 C 925/93, NJW-RR 1996, 565;
AG Koblenz, 12.11.1996, 16 C 1056/96;
AG München, 23.06.1995, 271 C 18968/94, Unilex;
AG Nordhorn, 14.06.1994, 3 C 75/94, Unilex;
AG Riedlingen, 21.10.1994, 2 C 395/93, Unilex;
AG Wangen, 08.03.1995, 2 C 600/94, Unilex;
AG Zweibrücken, 14.10.1992, 1 C 216/92, Unilex.

10. Italy

Corte Suprema di Cassazione, 09.06.1995, 6499, Dir. com. int. 1996, 652 No. 124, Alfred Dunhill Ltd. v. Tivoli Group S.r.l.;
Corte di Appello (CA) di Genova, 24.03.1995, 211, Marc Rich & Co. A.G. v. Iriteena S.p.A.;
CA di Milano, 11.12.1998, Riv. dir. int. priv. proc. 1999, 112, Bielloni Castello s.p.a. v. EGO SA;
Tribunale Civile di Cuneo, 31.01.1996, 45/96, Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils.

11. Mexico

Comisión para la Proteción del Comercio Exterior de Mexico (Compromex), 04.05.1993, M/66/92, Unilex, José Luis Morales y/o Son Exporting c. Nez Marketing;
Compromex, 30.11.1998, Seoul International Co. Ltd. et. al. c. Dulces Luisi, SA de C.V.

12. Netherlands

Hoge Raad (HR), 25.09.1992, 14566, NIPR 1993, No. 105, Société Nouvelle des Papéteries v. BV Machinefabriek;
HR, 26.09.1997, 16253, NILR 1997, 421, M.J.M. Productions v. Tissage Impression Mécanique TIM SA;
HR, 20.02.1998, c96/260 HR (16442), NJB 1998, 566, Bronneberg v. Ceramica Belvédère SPA;
Gerechtshof (Gh) Amsterdam, 16.07.1992, 550/92 SKG, NIPR 1992, No. 420, Box Doccia Megius v. Wilux International BV;
Gh Amsterdam, 08.04.1993, 495/92, NIPR 1993, No. 268, Verwer v. Pex Handelsmij. BV & Toshiba Deutschland GmbH
Gh Arnhem, 22.08.1995, 94/305, NIPR 1995, 683, Diepeveen-Dirkson BV v. Nieuwenhoven Veehandel GmbH;
Gh Leeuwarden, 05.06.1996 9407120, NIPR 1996, No. 404;
Gh's-Hertogenbosch, 26.10.1994, 26/94/RO, NIPR 1995, 239, Jungmann Nutzfahrzeuge Handelsgesellschaft mbH v. Terhaag Bedrijfsauto's BV;
Gh's-Hertogenbosch, 14.12.1994, NIPR 1995, 244;
Gh's-Hertogenbosch, 01.03.1995, 528/94/RO, NIPR 1995, 413, Sicamob International SA v. Wulms Eierhandel BV;
Gh's-Hertogenbosch, 09.10.1995, 334/95/MA, NIPR 1996, 187, Tissage Impression Mécanique J.J.M. SA v. M.J.H.M. Foppen;

Gh's-Hertogenbosch, 26.02.1992, 856/91/BR, NIPR 1992, No. 377, Melody BV v. Loffredo, h.o.d.n. Olympic;
Gh's-Hertogenbosch, 16.12.1996, 495/95/HE, NIPR 1997, 127;
Gh's-Hertogenbosch, 19.11.1996, 770/95/HE, NIPR 1997, 175;
Gh's-Hertogenbosch, 24.04.1996, 456/95/HE, NIPR 1996, 323, E.H.T.M. Peters v. Kulmbacher Spinnerei GmbH & Co. Produktions KG;
Gh's-Hertogenbosch, 27.11.1991, 981/90/BR, NIPR 1992, No. 228, De Vos en Zonen BV v. Reto Recycling GmbH;
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